Judgments of the Administrative Tribunal of the International Labour Organization:

76th Session
(November 1993 - January 1994)

International Labour Office
Geneva

READEX
FICHE

ISSN 0378-7362

First published 1994

Annual subscription: 65 Swiss francs

CONTENTS

Judgment No.

1301 Lochner v. ILO
1302 Cardenas Aguila v. ESO
1303 Saunders v. ITU No. 8
1304 Coe v. WTO
1305 Sharapov v. UNIDO
1306 Der Hovsépian v. UPU No. 2
1307 Meyer v. Eurocontrol
1308 Ho v. WHO
1309 Ahmad v. UNESCO No. 3
1310 Kigaraba v. UPU No. 2
1311 Guerra Ardiles v. ESO
1312 Jiang v. IAEA
1313 Sharma v. WHO No. 4
1314 Faymann v. ILO
1315 Menapace v. EPO
1316 van der Peet v. EPO No. 17
1317 Amira v. ITU
1318 Desenclos v. ILO
1319 Moscoso v. WHO
1320 Figuera de Pérez v. ITU
1321 Bernard v. CERN
1322 Anderson v. ITU
1323 Morris v. WHO No. 2
1324 Rivero v. EPO
1325 El Mahjoub v. ILO No. 2
1326 Gautrey v. ITU
1327 Gillespie v. PAHO
1328 Bluske v. WIPO No. 3
1329 Ball and Borghini v. CERN
1330 Bangasser, Dunand, Marguet-Cusack and Sheeran No. 2 v. ILO
1331 Roggiero v. PAHO
1332 Mermier v. CERN No. 2
1333 Franks No. 2 and Vollering No. 2 v. EPO
1334 Abraham, Poppinger and Ronesch Nos. 1 and 2 v. IAEA
1335 Madingar v. WHO No. 2
1336 Cassegney v. OIE
Kunicke No. 3 (withdrawal)
Teferra (withdrawal)

LIST OF JUDGMENTS IN ALPHABETICAL ORDER

Abraham v. IAEA Nos. 1 and 2: 1334
Ahmad v. UNESCO No. 3: 1309
Amira v. ITU: 1317
Anderson v. ITU: 1322
Ball v. CERN: 1329
Bangasser v. ILO: 1330
Bernard v. CERN: 1321
Bluske v. WIPO No. 3: 1328
Borghini v. CERN: 1329
Cardenas Aguila v. ESO: 1302
Cassegney v. OIE: 1336
Coe v. WTO: 1304
Der Hovsépian v. UPU No. 2: 1306
Desenclos v. ILO: 1318
Dunand v. ILO: 1330
El Mahjoub v. ILO No. 2: 1325
Faymann v. ILO: 1314
Figuera de Pérez v. ITU: 1320
Franks v. EPO No. 2: 1333
Gautrey v. ITU: 1326
Gillespie v. PAHO: 1327
Guerra Ardiles v. ESO: 1311
Ho v. WHO: 1308
Jiang v. IAEA: 1312
Kigaraba v. UPU No. 2: 1310
Kunicke v. Eurocontrol No. 3: (withdrawal)
Lochner v. ILO: 1301
Madingar v. WHO No. 2: 1335
Marguet-Cusack v. ILO: 1330
Menapace v. EPO: 1315
Mermier v. CERN No. 2: 1332
Meyer v. Eurocontrol: 1307
Morris v. WHO No. 2: 1323
Moscoso v. WHO: 1319
Poppinger v. IAEA Nos. 1 and 2: 1334
Rivero v. EPO: 1324

Roggiero v. PAHO: 1331
Ronesch v. IAEA Nos. 1 and 2: 1334
Saunders v. ITU No. 8: 1303
Sharapov v. UNIDO: 1305
Sharma v. WHO No. 4: 1313
Sheeran v. ILO No. 2: 1330
Teferra v. FAO: (withdrawal)
Vollering v. EPO No. 2: 1333
van der Peet v. EPO No. 17: 1316

The Administrative Tribunal of the International Labour Organisation (ILO) is competent to hear complaints against:

International Labour Organisation, including the International Training Centre

World Health Organization (WHO), including the Pan American Health Organization (PAHO)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

International Telecommunication Union (ITU)

World Meteorological Organization (WMO)

Food and Agriculture Organization of the United Nations (FAO)

European Organization for Nuclear Research (CERN)

General Agreement on Tariffs and Trade (GATT)

International Atomic Energy Agency (IAEA)

World Intellectual Property Organization (WIPO)

European Organisation for the Safety of Air Navigation (Eurocontrol)

Universal Postal Union (UPU)

European Patent Organisation (EPO)

European Southern Observatory (ESO)

Intergovernmental Council of Copper-Exporting Countries (CIPEC)

European Free Trade Association (EFTA)

Inter-Parliamentary Union (IPU)

European Molecular Biology Laboratory (EMBL)

World Tourism Organization (WTO)

African Training and Research Centre in Administration for Development (CAFRAD)

Intergovernmental Organisation for International Carriage by Rail (OTIF)

International Center for the Registration of Serials (CIEPS)

International Office of Epizootics (OIE)

United Nations Industrial Development Organization (UNIDO)

International Criminal Police Organization (Interpol)

International Fund for Agricultural Development (IFAD)

International Union for the Protection of New Varieties of Plants (UPOV)

Customs Co-operation Council (CCC)

This volume contains the judgments the Tribunal delivered at its 76th Session (November 1993-January 1994). The judgments it delivered at its first 39 sessions (Nos. 1 to 330) were published in the Official Bulletin of the International Labour Office. The judgments it delivered at its 40th to 75th Sessions have appeared in thirty bound volumes, which may be ordered from the Publications Branch, International Labour Office, CH 1211 Geneva 22.

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

SEVENTY-SIXTH SESSION

In re LOCHNER Judgment 1301

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Stella Lochner against the International Labour Organisation (ILO) on 22 July 1992 and corrected on 16 November, the ILO's reply of 25 February 1993, the complainant's rejoinder of 6 April and the Organisation's surrejoinder of 26 May 1993;

Considering Articles II, paragraph 1, and VII, paragraph 1, of the Statute of the Tribunal and Articles 4.12, 6.7, 13.1 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 6.7 of the Staff Regulations of the International Labour Office reads:

> "1. The performance of each official shall be appraised on a form prescribed by the Director-General after consulting the Administrative Committee. The appraisal shall be carried out by the official's responsible chief who may obtain the views of a subordinate supervisor or where appropriate any other official under whose supervision the official has worked during the period under review ...
>
> 2. The appraisal shall be communicated to the official, who shall initial and return it within eight days of its receipt attaching to it any observations he may wish to make. These observations shall be filed with the appraisal unless the Director-General decides otherwise. The appraisal, together with any observations which may have been made by the official, shall then be transmitted to the official to whom the responsible chief reports, who may add his observations to it, in which case it shall be returned to the responsible chief and to the official for initialling. It shall then be transmitted to the Secretary of the Reports Board for appropriate action.

> 3. A performance appraisal shall be established on the completion of an official's first nine months of service, after eighteen months, after thirty-three months, after forty-five months, and at the end of every two-year period thereafter ..."

The complainant, an Austrian citizen, began working for the ILO in 1974 at grade G.2. She was assigned to the Personnel Development Branch in 1983 and had risen to grade G.4 by 1990, when her post was regraded G.5. In the same year she won a competition for a G.6 post in the Personnel Policy Branch, to which she was transferred on 1 October 1990.

On 1 December 1989 the former chief of the Personnel Development Branch sent her a draft appraisal of her performance from 1 December 1986 to 31 August 1989, when he had left the Branch. There followed correspondence and discussions with the complainant in which the Administration urged her to initial the report and add any comments she wanted. She objected to the length of the report period. On 6 December 1990 she made a "request for review" under Article 13.1 of the Staff Regulations alleging breach of the rules on performance appraisal.

In a minute dated 21 December 1990 the chief of the Personnel Development Branch asked his predecessor to revise his original draft appraisal for 1986-89 so that it covered only the period from 1 December 1986 to 30 November 1987; a second report would be prepared for the period from 1 December 1987 to 30 November 1989, and he invited his predecessor to make a contribution to it covering the period up to 31 August 1989. The former chief of the Branch agreed in his minute of 14 January 1991, acknowledging that the report for 1986-87 had been late. In a minute dated 15 January the new chief of the Branch asked the complainant to initial and return the revised appraisal for 1986-87 within eight days. Also on 15 January her first-level supervisor sent her a draft appraisal for 1987-89. In a minute of 21 January to the chief she pressed her 13.1 request.

Having failed to get her to sign the appraisal for 1986-87 or explain the basis of her request for review, the chief told her in a minute of 8 February 1991 that he would put the revised appraisal for 1986-87 to the Reports Board along with the correspondence and would draw the Board's attention to the draft appraisal for 1987-89 unless she discussed it with her supervisor within the week.

On 15 February 1991 she lodged a "complaint" under Article 13.2 of the Staff Regulations against the validity of the appraisal of 1 December 1989 of three years' performance. In a minute of 18 April the Director of the Personnel Department explained to her on the Director-General's behalf that the "appropriate method" of challenging an appraisal on procedural or substantive grounds was the procedure established under the Staff Regulations that involved consideration of it by the Reports Board and a final decision by the Director-General on the Board's report. The Director accordingly recommended that she fill up the relevant sections of the forms so as to let the Board have "completed performance appraisals" rather than drafts. The Director also invited her to send the Board "clarifications" of her "complaint". On 15 May she returned the draft appraisals to the Director, but without initials or comments.

In its comments of 7 June 1991 the Board regretted the "errors of procedure" that flawed the report for the period from 1 December 1986 to 30 November 1987. It asked her to initial the report and append any comments she cared to make; otherwise it would have the draft put in her file with the material correspondence. As to the appraisal for the period from 1 December 1987 to 30 November 1989 the Board said that any failure to comply with the established procedure was the complainant's own fault, but again it recommended that she get a "last chance" to put things right by completing the appraisal procedure before the draft and correspondence went on file. By a letter of 23 April 1992, which she is impugning, the Director of the Personnel Department informed her that the Director-General had decided to put the draft appraisals and material correspondence in her file.

B. The complainant submits that the ILO failed to comply with the rules as to the two draft reports on her performance from 1 December 1986 to 30 November 1989. Although she maintains that they are wrong in substance about the quality of her work, her objections bear mainly on procedure.

Under Article 6.7.3 of the Staff Regulations she should have had a report every two years. The draft report submitted to her on 1 December 1989 covered nearly three. The two draft reports the ILO supplied in January 1991 - one for the period from 1 December 1986 to 30 November 1987, the other for the period from 1 December 1987 to 30 November 1989 - were just a "cover-up" for its breach of procedure. In any event it acted too late: a report was due by the end of February 1988 on her performance from 1 December 1986 to 30 November 1987. The delay ruled out "timely feed-back", prevented her from making good her shortcomings and allowed her former chief's soured relations with her to taint his recollections of her performance.

She further alleges that the ILO failed to discharge its duty to consult her beforehand. The Reports Board's guidelines say that the "preparation of the performance appraisal should be the occasion for discussion between the supervisor and the official" and that the written assessment "should not come as a surprise to the official at the end of a review period". But the criticisms of her in the first report came out of the blue.

She submits that the reports are not "appraisals" within the meaning of Article 6.7. So it was not open to her to initial them or comment on the substance without seeming to treat them as valid in law. She seeks the quashing of the impugned decision, the removal from her personal file of "defamatory comments" in the appraisals and an award of token damages for distress and for injury to her career prospects and personal and professional reputation.

C. In its reply the ILO submits that her complaint is irreceivable because she has failed to exhaust the internal remedies. To correct possible errors of judgment ILO staff may comment on appraisals of their performance. But the complainant chose not to do so. The Organisation also has a review procedure whereby its Reports Board examines alleged errors of judgment or of procedure. Again she refused to comply with the established procedure. So the decision she is challenging is not "final" within the meaning of Article VII(1) of the Tribunal's Statute.

On the merits the ILO contends that her withholding comments on the draft appraisals and her unwillingness to supply the required information or discuss the matters at issue caused the whole exercise to break down. She was wrong to reserve for the Tribunal her observations on the substance of her appraisals: in any event it will not replace the ILO's views of her performance with its own. While acknowledging errors of procedure in preparing the first report, the Organisation blames the dispute on her own "intransigence", not on administrative delay. Her refusal to comment on the substance made the second report incomplete as well.

Under the circumstances what could the Organisation do but put copies of the draft reports along with the relevant documents in her personal file? Though they may not amount to complete 6.7 "performance appraisals", they are "documents relating to measures officially taken or considered in connection with the official" within the meaning of Article 4.12 and should therefore go on file.

It is up to her to show what injury, if any, she suffered that she did not bring upon herself. If her fears of damage to her career prospects were genuine she had only to comment on the issues raised in the reports.

D. In her rejoinder the complainant enlarges on her earlier pleas. She denies that she was in any way to blame. It was not she who drafted the appraisal for 1986-87 inadmissibly late and in breach of the rules of procedure. Since, as the Organisation concedes, the material documents do not constitute 6.7 performance appraisals she was under no duty to initial and return them. What requirement is there in the Staff Regulations to sign reports that are not in line with the rules?

As for the moral injury, she maintains that the accusations levelled against her by her present and former chiefs were akin to a "witch-hunt".

E. In its surrejoinder the ILO maintains that the procedural errors it committed were not so great as to preclude correcting them or treating the reports as performance appraisals. It was her refusal to act that made them incomplete appraisals. A staff member's refusal to complete the form does not strip an appraisal of legal effect. As to the injury she alleges the ILO points out that in the months following the periods covered by the two reports she rose by two grades in the General Service category.

CONSIDERATIONS:

1. The complainant joined the ILO in 1974 in the General Service category at grade G.2. In 1983 she was assigned to the Personnel Development Branch as a personnel clerk under the supervision of the secretary to the Selection Board. By 1990 she had reached grade G.5. On 1 October 1990 she was transferred to the Personnel Policy Branch after winning a competition for a G.6 post in that Branch. She is seeking the removal from her personal file of what she sees as libellous comments in two draft reports appraising her performance from 1 December 1986 to 30 November 1989, when she was still in the Personnel Development Branch.

2. In the draft report covering the period from 1 December 1986 to 30 November 1987, which she was given on 14 January 1991, the former chief of the Branch said that she had performed her duties "with competence and skill" and notwithstanding pressure had maintained "a high level of accuracy and attention to detail". But he added that her relations with her first-level supervisor "were less than desirable" and spoke of her "uncooperativeness", and it is to those remarks that she takes strong exception.

3. In a further draft report appraising her performance from 1 December 1987 to 30 November 1989 her first-level supervisor, the secretary to the Selection Board, described her as "a conscientious and hard worker" and as "competent" and "efficient" but said that she "had difficulties in working in a team". To that comment too she takes exception.

4. After making a request for review under Article 13.1 of the Staff Regulations and after further correspondence, both of which failed to give her satisfaction, she lodged a "complaint" on 15 February 1991 under Article 13.2 alleging unfair treatment and procedural "irregularities", in particular delay in drafting the report for 1986-87 and lack of proper consultation between her and her supervisor.

5. In an interim reply of 18 April 1991 to her 13.2 "complaint" the Director of the Personnel Department said:

> "... the appropriate method of contesting the procedure leading to, or the merits of, a performance appraisal, is the specific procedure established under the Staff Regulations, which involves consideration of appraisals by the Reports Board and a subsequent decision, on the basis of the Board's report, by the Director-General."

The Director therefore asked her to complete the reports "as soon as possible" so that they could go to the Reports Board. In answer, however, she merely sent them back without comment on 15 May and in a minute of that date maintained that she did not accept them as valid.

6. In "comments" dated 7 June 1991 which were forwarded to her the Reports Board observed that she had not commented on the appraisals; it asked her to sign them, make any comments she wished and return them to it. She did not sign and she did not comment.

7. In a letter of 23 April 1992 in final answer to her Article 13.2 complaint the Director of the Personnel Department said that the Director-General had noted her failure to take the action set out in the Director's minute of 18 April 1991 and in the Board's comments of 7 June 1991. Since she had failed to "make use of the opportunity given to state [her] grievances", the Director-General saw no grounds for holding that she had been treated inconsistently with the Staff Regulations or with the terms of her contract of employment and the draft appraisals would be "placed on [her] file along with all the relevant correspondence".

8. Article VII, paragraph 1, of the Tribunal's Statute reads:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

The requirement that a complainant go through any internal procedure is not just a formality. The complainant therefore had an obligation to make due efforts under the rules to challenge the appraisals of her performance. The appraisals fell within the purview of the Reports Board, whose members are familiar with ILO procedures and standards for reporting and competent to make recommendations both on procedure and on substance. The Board may in particular recommend withdrawing or altering appraisals. By refusing to put to it her comments on the draft reports she is challenging the complainant failed to avail herself of the means at her disposal to have the reports withdrawn or altered. Her complaint is therefore irreceivable under Article VII(1) of the Statute.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas
William Douglas

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re CARDENAS AGUILA Judgment 1302

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Luis Cárdenas Aguila against the European Southern Observatory (ESO) on 29 January 1993, the ESO's reply of 12 May, the complainant's rejoinder of 6 June and the Observatory's surrejoinder of 23 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles LS II 1.09, LS II 1.13 and LS II 5.04 of the Regulations for ESO Local Staff in Chile as in force before 1984 and Article LS II 1.07 of the same Regulations as now in force;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Chilean born in 1938, was employed by the ESO first in 1976, then under a short-term contract from 30 December 1977 to 28 February 1978 as a guard at grade A2. After his contract expired he worked from time to time in the first-aid unit at the Observatory's station at La Silla, in the Chilean Andes, as locum tenens for medical assistants at the weekend or when they were on leave.

On 1 December 1980 a private Chilean company at La Serena, known as Servicios generales y administrativos (SEGA), contracted with the ESO to provide the services of two nurses and from 1 December 1980 to October 1992 employed the complainant to perform nursing duties in the first-aid unit. According to a schedule to his service agreement with the company his working conditions were to be subject to the authority of the ESO's Department of Personnel and SEGA would employ him for as long as the ESO needed his services.

The ESO withdrew from its contract with SEGA as from October 1992 and concluded one instead with a Chilean institute for occupational safety. By a letter of 24 September 1992 SEGA informed the complainant that it was terminating his service agreement with it on the grounds that the services which it had appointed him to provide were no longer required. By another letter, of 19 October, it informed him that the ESO would grant him an indemnity ex gratia in the amount of twelve months' basic salary, which SEGA would make over to him in the terminal settlement.

On 25 October 1992 the complainant appealed against termination to the ESO's Director in Chile and claimed the benefits due under the Regulations for Local Staff. In a letter of 23 November the ESO's representative in Chile replied that, not having been a member of the ESO's staff since February 1978, he was not subject to those Regulations and, since the Observatory's appeal procedure was therefore not open to him, he should put any claims he might have to SEGA. By a letter of 4 December 1992 he submitted an internal appeal to the Director General. In a letter of 7 January 1993 to his counsel - the decision under challenge - the Head of Administration confirmed that his appeal was irreceivable for the reasons already given.

B. The complainant submits that his dismissal was wrongful and based on mistaken conclusions of fact. Article LS II 5.04 1) of the Regulations for Local Staff, on which he says the ESO based his dismissal, provides that such staff may be dismissed upon "termination of the work or service for which the contract was made". But the ESO merely turned over to others the work he had been doing for many years and had its agent, SEGA, pay him off with another twelve months' salary.

He seeks the quashing of the decision of 7 January 1993 and reinstatement with full rights from the date of termination or, failing that, an award of three years' gross pay for loss of career prospects and moral injury. He claims payment by the ESO of social security contributions for the period from October 1976 to October 1979, of all benefits and allowances he should have been granted since joining the ESO, and costs.

C. In its reply the ESO submits that the complaint is irreceivable under Article II(5) of the Tribunal's Statute, which confines competence to cases of alleged "non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations". He may not now allege breach of any term of his appointment because his last contract with the ESO was the one that expired on 28 February 1978. Nor indeed were the Observatory's Regulations applicable to him.

Under Article LS II 1.09 of the Local Staff Regulations the signing of a contract is an essential condition of recruitment. The complainant was under contract with a private company at the material time and therefore subject to Chilean labour law. As is plain from the case law the fact that an international organisation set the complainant's working conditions did not make him subject to its regulations. Nor did the ESO's inviting SEGA to pay him a special indemnity at the Observatory's own expense make him a staff member.

D. In his rejoinder the complainant maintains that for years his real employer was the ESO: it had the benefit of his services, set the length of his contract, supervised him and took charge of his training, salary and allowances and the cost of supplies. The contract he signed with it in 1977 was tacitly converted into one of indefinite duration in keeping with Articles LS II 1.13 and LS II 5.04 12) of the Local Staff Regulations. At the material time those Regulations provided for the offer of such a contract after probation, the understanding being that if an employee continued working after his original contract expired it became permanent. That his original contract was for his services as a guard, not as a nurse, was just a provisional arrangement which the ESO made because it already had two permanent staff nurses.

E. In its surrejoinder the ESO disputes the complainant's assumption that his contract became a permanent one. Article LS II 5.04 12) as in force at the material time applied only to a local staff member whom the ESO kept on after expiry of a fixed-term contract that ran for six months. The complainant's only ESO contract was for two months, and his later occasional employment affords no grounds for inferring continuance of his contract with the Observatory. He went on to spend a dozen years under contract with a private firm. Besides, even if he was a staff member his claims are by now time-barred.

CONSIDERATIONS:

1. At its astronomical observatory in the north of Chile, at La Silla, the ESO maintains a first-aid unit for staff. Up to June 1979 it employed in the unit on weekdays at least one permanent medical assistant as a member of its Local Staff and at weekends and to replace the assistants during holidays temporary part-time "paramedics".

2. In a personal history form which he submitted to the Observatory on 21 June 1979 the complainant stated that since 1976 he had "rendered sporadically services" at the first-aid unit. He says that at first the ESO took him on in October 1976 after he had answered an advertisement it had put in a newspaper at La Serena calling for the services of paramedics at weekends; then, from 30 December 1977 to 28 February 1978,

he served as a local staff member under a two-month contract. Although he continued to work in the unit thereafter, it is not quite clear whether he was a part-time or full-time employee. At all events the Observatory states that when its then medical assistant retired in June 1979 it appointed no successor but decided to take on independent paramedics for work on weekdays. It is therefore probable that the complainant worked full time as such from June 1979.

3. On 1 December 1980 the ESO concluded a contract with a Chilean firm known as Servicios generales y administrativos, or SEGA, whereby it undertook in consideration of a monthly fee to provide the Observatory with specified services, including those of two paramedics. Also on 1 December 1980 the complainant concluded a service agreement with SEGA as employer whereby he was to work as a paramedic in the first-aid unit at La Silla in return for a monthly salary to be paid by SEGA. The agreement expressly stated that it would last until the ESO ceased to require the services provided for in its contract with SEGA.

4. The contract between the ESO and SEGA came to an end in 1992 when the Observatory concluded a similar one with a Chilean institute for occupational safety which it believed better able to provide the medical and paramedical services it required. SEGA thereupon terminated its service agreement with the complainant.

5. On 25 October 1992 the complainant submitted an internal appeal to the ESO alleging that he was a member of its local staff and that it had wrongfully dismissed him. But by a letter of 7 January 1993 the Head of Administration informed him that since he had not been a local staff member his appeal was irreceivable. That is the decision he is impugning.

6. He maintains that under the two-month contract he held with the ESO from 30 December 1977 to 28 February 1978 he had the status of a local staff member on a fixed-term appointment and that his continuing to work for the Observatory thereafter made his appointment a permanent one in accordance with Article LS II 5.04 12) of the Regulations for Local Staff as in force at that time. But his plea fails. For one thing, his contract was not a fixed-term but only a "temporary" one; for another the sporadic services he may have rendered thereafter were not such as to entitle him to contend that he continued to work for the ESO. The rule therefore did not apply.

7. He further submits that the ESO was required under Article LS II 1.13 as then in force to grant him a permanent appointment. But the argument again is unsound. That rule was applicable only upon satisfactory completion of probation under a contract for a period of not less than six months, whereas the complainant's contract was for a lesser period. Besides,

the ESO did not in fact offer him a permanent appointment at the time and it is too late for him now to object to its failure to do so. The conclusion is that he was not a local staff member on 1 December 1980.

8. Article LS II 1.07 of the ESO's Regulations for Local Staff stipulates that there shall be a written contract of employment signed by the local staff member and by someone designated by the Director General on behalf of the Observatory. The complainant holds no contract purporting to have been entered into by or on behalf of the Observatory. Although he contends that SEGA was the entity designated by the Director General to sign on the ESO's behalf the service agreement with him dated December 1980, he offers no evidence whatever to bear out that contention.

9. In support of his view that his employer was not SEGA but the Observatory he puts forward two pleas.

(a) The first is that in its pleadings on the complaints that the Tribunal ruled on in Judgments 507 (in re Azola Blanco and Véliz García) and 508 (in re Acosta Andres) the ESO argued that the services provided by SEGA covered "only short-term manual labour for which it would be uneconomical to employ permanent staff and which [was] therefore contracted out"; and he points out that the work he performed under contract for 12 years was not "manual" but technical and was by no means "short-term".

(b) His second plea is that he was working throughout on ESO premises, and that the Observatory determined his functions, exercised control and supervision over his work and gave him board and lodging and transport.

Such allegations do not, however, suffice to establish that it was the ESO that in 1980 appointed him as a member of its local staff. The fact of the matter is that it was SEGA that employed him on its own behalf, not as an agent of the ESO. Since he is wrong in contending that the ESO was his employer the Tribunal is not competent to entertain his complaint, and it must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

Wm Douglas

William Douglas

E. Razafindralambo

Mark Fernando

ABGardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re SAUNDERS (No. 8) Judgment 1303

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Yann Harris Saunders against the International Telecommunication Union (ITU) on 30 April 1993 and corrected on 19 May, the ITU's reply of 23 June, the complainant's rejoinder of 23 August and the Union's letter of 16 September 1993 saying that it did not wish to file a surrejoinder;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal and Regulation 2.1 and Rule 3.4.2.3 of the ITU Staff Regulations and Staff Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at the ITU has been summed up under A in Judgments 970, 988, 989, 1018, 1093, 1171 and 1281. The origin of his dispute with the Union lies in the Secretary-General's decision of 8 October 1985 to regrade his G.5 post to P.2 as from 1 January 1986 and the common feature of his complaints is his objections to consequent loss of current earnings and future pension entitlements.

In a memorandum dated 12 August 1992 to the Secretary-General he alleged breach of the rule requiring equal pay for work of equal value on the grounds that his pay for July 1992 was lower than that of another staff member, whom he did not name, and who he said had been employed at the same grade and in the same administrative situation but from a later date. The Deputy Secretary-General replied in a memorandum of 28 September that since he was not in the same position as those he wanted to be compared with the comparison would not be a valid one; the Secretary-General therefore declined to reconsider the matter of his pay for July 1992.

The complainant appealed on 2 October to the Appeal Board. In its report of 12 February 1993 the Board held that although his appeal was receivable he could get no redress in law; it recommended "a pragmatic solution". The Secretary-General having taken no further express decision, the complainant infers rejection from expiry of the sixty-day time limit in Article VII(3) of the Tribunal's Statute.

B. The complainant submits that the ITU was in breach of the rule about equal pay for work of equal value and the broader principle of equal treatment. His pay was some 20,000 Swiss francs a year lower than that of another official in like case. Although both of them were recruited at grade G.4 and worked their way up to P.2, he himself was paid at step 12 and his colleague at a "fictitious" step that was numbered 23. As a result his own "income ceiling" was only 7 per cent higher than the G.4 ceiling while the other official's was 44 per cent higher. That was in breach of Regulation 2.1, which says that grading "is based upon the principle of equal pay for substantially equal work". It also flouted the principle of seniority inasmuch as the complainant reached P.2 twelve years before his colleague, whose name he withholds so as to forestall any protest from the Union against what it described in its pleadings on his second complaint as "unacceptable" naming of other officials.

He wants the Tribunal (1) to quash his pay slip for July 1992 and all later payments at step 12 of grade P.2; (2) to grant him pay and pensionable remuneration at "fictitious step 27" on the ITU's "special P.2 scale" as from July 1992; and (3) to order (a) the review of his "remuneration ceiling" to bring it into line with the increments he would have had "if he had advanced by five full grades in a single category" or if each promotion had been "correctly cumulated" and (b) the review of Rule 3.4.2.3 on salary policy to ensure that anyone promoted to the Professional category or granted a special post allowance should get either the "same lasting pay differential" as if he had got promotion within the same category or a "percentage increase in the income ceiling" equivalent to the sum of the percentage increases he would have got by moving from grade to grade in successive categories. He also claims moral damages and costs.

C. In its reply the Union observes that the complainant was aware as long ago as February 1990 of the injury he now alleges, since he then wrote to the chairman of the Appeal Board objecting to "a short-payment of salary". Not having filed an internal appeal within the prescribed time limits, he has failed to exhaust the means of redress available to him within the organisation and his complaint is therefore irreceivable under Article VII(1) of the Tribunal's Statute.

Moreover, since he failed to submit claim (3)(b) to the Appeal Board it is irreceivable for that reason too. In any event the Tribunal may not entertain applications for the amendment of a staff rule.

On the merits the ITU points out that the complainant is relying on unproven allegations and on pleas that the Tribunal has already entertained. The Tribunal ruled in Judgment 1093, on his third complaint, that he was promoted to P.2 from G.5, not G.7. So his claim to "step 27" in P.2 is groundless. As for his charges of discriminatory treatment, the Union is not accountable for his failing to support his contentions with substantive evidence. Only on the strength of "objective, factual, administrative or legal elements" will the Union treat a case differently from another seemingly identical one.

D. In his rejoinder the complainant presses his pleas and offers to provide whatever supporting evidence the Tribunal may want. In his submission the facts show that his present pay does not "correctly" reflect promotion spanning six grades over some 20 years of service. So great is the injury that promotion has caused him that he has sought reassignment to a G.7 post.

CONSIDERATIONS:

1. The complainant has held grade P.2 since 1985. He contends that he has been paid less since July 1992 than another, unnamed, ITU staff member who is also performing P.2 duties and that that is in breach of the principle of equal pay for work of equal value; that he reached grade P.2 twelve years before the other official and by reason of his seniority should be paid at a higher step; and that certain general principles of law which international organisations in the United Nations system are required to respect may override the express provisions of staff regulations.

2. In its reply the Union points out that he was promoted from G.5 to P.2 and his basic salary at P.2 was to be determined by the rules governing promotion from the General Service to the Professional category. In answer to his argument that there is a body of principles which may override the express provisions of staff regulations the Union submits that the Tribunal has no competence to order the Union to amend its Staff Regulations or Staff Rules.

3. Article II, paragraph 5, of the Tribunal's Statute confers competence to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of such provisions of the Staff Regulations as are applicable to the case. The complainant has been unable to show any failure to observe the terms of his appointment or any breach of the ITU Staff Regulations or Rules. As to pay the factual situation of the other staff member is not the same as his own inasmuch as the other was promoted from grade G.7 and his pay at grade P.2 was determined accordingly.

4. The claim to an order for review of Rule 3.4.2.3 must fail because the Tribunal does not have competence to make such an order. The rejection of the principal claims entails that of the claims to damages and costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas

William Douglas

Mark Fernando

AB Gardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re COE Judgment 1304

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Edward Coe against the World Tourism Organization (WTO) on 30 December 1992 and corrected on 21 January 1993, the WTO's reply of 30 March, the complainant's rejoinder of 6 July and the Organization's surrejoinder of 29 September 1993;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal and WTO Staff Rule 29(4);

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States born in 1944, was employed by the WTO under a "consultancy contract" as chief technical adviser to a project for tourism planning and training, in Mozambique. The project, which the United Nations Development Programme (UNDP) was funding, was based in Maputo, where the complainant reported for duty in October 1991. His contract was to run from 21 October 1991 to 31 October 1993 and either party might terminate it by giving three months' notice. The complainant's rights and obligations were expressly limited to the terms of the contract, which provided for the referral of any dispute to the Tribunal.

By a letter of 23 March 1992 the Deputy Secretary-General of the WTO asked the UNDP's Resident Representative in Maputo to report on the complainant's performance in the light of information from the Deputy Resident Representative that he had taken unauthorised leave. In his reply of 7 April the Resident Representative said that, although the complainant maintained he had been working at home and on the Mozambican island of Inhaca "talking to local small-scale entrepreneurs", his "counterparts" in the Ministry of Tourism had not seen him since mid-February and had "no idea what he does with his time".

In a telex of 2 April he had applied for leave from 10 April to 1 May. Having submitted to the Ministry on 6 April "a draft master plan" for the development of tourism in the country, he left Maputo on 8 April. In a telephone conversation from New Jersey on 10 April he told the WTO's technical cooperation officer for Africa at headquarters in Madrid that he was in the United States for medical treatment and would not be going back to Maputo until his health was better; he had left a copy of the draft plan to be picked up at Barajas airport in Madrid.

In a fax of 20 April the technical cooperation officer asked him to provide a copy of the master plan and for the quarterly progress report he was required to submit under the terms of his contract, and also to explain why he had left his duty station two days before the date he had applied for.

By a letter of 24 April 1992 the Secretary-General told the complainant of his suspension without pay as from 1 April 1992 "in conformity with rule 29.4 of WTO Staff Rules" pending investigation of charges of improper behaviour and called upon him to account for his unauthorised "absence from duty for several weeks" and to supply the draft master plan.

In a letter dated 30 April to the Resident Representative the national director for tourism recommended ending his contract as from 8 April 1992, and in a telex of 6 May to the Deputy Secretary-General of the WTO the Resident Representative agreed.

In a fax of 5 May to the technical cooperation officer at headquarters the complainant sought the reversal of the decision to suspend him on the grounds that it was in breach of contract; he explained why he had been away from the office and refuted the allegations of misconduct in the Secretary-General's letter of 24 April.

On 18 May the technical cooperation officer sent the complainant in Washington D.C. copies of recent correspondence about him and invited written comments. The correspondence alleged drunkenness, unruly behaviour, failure to meet deadlines and general unsuitability for the international civil service.

The complainant returned to Mozambique on 25 May. Charges of excessive and unsubstantiated claims to the refund of expenses were made against him at a meeting which the Resident Representative had on 3 June with him, national officials and the technical cooperation officer, who was in Maputo on mission at the time. In a fax of 10 June from Madrid the Chief of Personnel gave him until 13 June to send comments on the charges against him. Replying by a fax of 12 June, he said that, failing more specific requests for clarification, he believed his statement of 5 May answered most of the material points and that the Administration already had enough information to be able to lift the suspension.

On 16 June the Resident Representative published a notice in the national press of Mozambique stating that the complainant had ceased on 31 March to be adviser to the tourism development project and was "no longer a UNDP staff member" and that the Programme would not be responsible for any debts he might incur.

By a fax of 17 June the Chief of Personnel ordered the complainant to report to Madrid on 22 June 1992 or else face summary dismissal. In his reply of 18 June the complainant said that he would come if the Administration made proper travel arrangements for him and met his expenses. In a telex of 24 June the Resident Representative informed the Chief of Personnel that the complainant had refused to leave Maputo on the ticket for travel by air to Madrid which the UNDP had put at his disposal.

In a letter of 24 June 1992 the Secretary-General told the complainant that his misconduct warranted summary dismissal and he was terminated as from 8 April 1992 "without any notice or indemnity". On 6 August the Resident Representative and the government officials saw him and agreed that the UNDP should seek leave from the WTO to let him have 2,000 United States dollars and repatriate him. In a memorandum of 18 August to the Secretary-General he alleged breaches of his contract by the WTO and asked whether the Secretary-General wished to seek a settlement "in a cooperative spirit".

On 31 August the Deputy Resident Representative informed him that the Organization agreed to pay him the $2,000 on condition that he acknowledged the termination of his contract with the WTO on 8 April 1992 and waived any further claims against the WTO or the UNDP. Having refused the offer in a memorandum of 4 September to the Resident Representative, the complainant left Maputo on 9 September. In a fax of 22 September the complainant again asked the Secretary-General whether he would settle. By a letter of 6 October 1992, the impugned decision, the Secretary-General confirmed the decision of 24 June to terminate the complainant's appointment on 8 April 1982.

B. The complainant submits that the impugned decision was in breach of his contract. If the WTO was dissatisfied with his services it had only to give him three months' notice; but there was no provision in his contract for summary dismissal with retroactive effect and without payment of repatriation benefit.

In any event the WTO has never cited any examples of misconduct or substantiated the Mozambican authorities' "false allegations", although he denied all of them promptly and invited the WTO to identify points on which it needed more information.

It also ignored his requests for information on how to fill in medical insurance claims and thereby deprived him of insurance benefits.

He claims the amount of his pay up to 30 September 1992, one month's salary and the cost of travel from Maputo to Washington as repatriation entitlements; the refund of the travel costs he has claimed, of the costs of transporting his personal effects to his home and of the expenses he incurred for telecommunications in April and May 1992; moral damages in an amount equivalent to six months' pay; assistance in processing his health insurance claims; a letter from the WTO retracting its charges of misconduct; and costs.

C. In its reply the WTO submits that the complaint is irreceivable. Although the complainant says he is challenging a decision of 6 October 1992 it merely confirmed the Secretary-General's decision of 24 June, which he had received on 29 June. That that was a final decision is plain from the fact that it contains the phrase "final decision" and gave him notice of summary dismissal. Since the time limit set in Article VII(2) of the Tribunal's Statute accordingly ran out on 28 September 1992, he filed too late.

In subsidiary arguments on the merits the Organization contends that his summary dismissal shows no procedural flaws and was warranted. It disputes his account of the facts, correcting what it sees as inaccuracies and listing his "blatant omissions". In its submission the evidence shows that he was in dereliction of duty and discredited the Organization through his bouts of drunkenness, misbehaviour in public and piling up of debts.

The gravity of his misconduct makes it "pointless" to ask whether or not summary dismissal is at the Secretary-General's discretion. He confuses the issue by arguing that the WTO had only to give him three months' notice of termination: that is the "normal procedure" to be followed when the parties want to sever contractual relations "for personal reasons". But, his "repeated misdemeanours" having already put him "outside the contractual framework", the Secretary-General had a duty to get rid of him at once in the Organization's interests.

D. In his rejoinder the complainant contends that the decision to terminate his contract in the letter of 24 June was not final. The Organization kept on negotiating the terms of his departure throughout July and August. In late August it invited him to sign a document conceding that his contractual relations with it had ended on 8 April. So it still did not consider the decision to terminate his contract as final at that time. In keeping with his duty under Article VII(1) to exhaust the available means of resisting the decision he asked the Secretary-General in his fax of 22 September to say whether he would settle. What set off the time limit was the Secretary-General's letter of 6 October - which he got on 23 October - refusing to negotiate any further.

On the merits he points out that there was no clause in his contract nor, for that matter, any other provision in law that might empower the WTO to terminate his appointment retroactively and abandon him in Mozambique. Its charges of misconduct are not backed up by a shred of evidence anyway.

E. In its surrejoinder the Organization develops its earlier pleas. It denies that there was any negotiation or further examination of his case during the material period: all it discussed at the time were the debts he had run up. As to the absence of a provision governing dismissal the WTO says it would be "absurd to consider that consultants are governed solely by the terms of their contracts". As the case law bears out, the Secretary-General is empowered under general principles of law to terminate employment on the grounds of unsatisfactory service.

CONSIDERATIONS:

1. The complainant signed a contract of appointment as a consultant with the WTO in October 1991. It said that he was to be in charge of drawing up and carrying out a project for the development of tourism in Mozambique and that his appointment was to run from 21 October 1991 to 30 October 1993, though either party might terminate the contract before the date of expiry by giving three months' notice.

2. After several incidents which are described in A above the Secretary-General of the Organization decided on 24 April 1992 to suspend the complainant from duty in accordance with Rule 29.4 of the Staff Rules pending a detailed report from him about the charges against him and his "absence from duty for several weeks". The explanations he gave were found unsatisfactory, and on 24 June the Secretary-General wrote to him again stating the charges and saying in conclusion that there was "no alternative but to terminate [his] contract without any notice or indemnity, as from 8 April 1992, date of [his] effective cessation of work". After further correspondence the Secretary-General wrote him a letter of 6 October 1992 confirming the decision of 24 June. That is the letter he is now impugning.

3. The WTO submits that the complaint is irreceivable because the complainant has not filed it within the time limit in Article VII(2) of the Tribunal's Statute:

> "To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned ..."

The Organization's case is that the decision to terminate the complainant's appointment was the one of 24 June 1992 and that his complaint, not being filed until 30 December 1992, was out of time.

4. In reply the complainant pleads Article VII(1) of the Statute, which says that a complaint shall not be receivable unless the impugned decision is a final one. In his submission the decision of 24 June 1992 was not to be treated as final, as is clear from the negotiations that took place from July to September 1992 between him and the Organization to seek a settlement out of court of the dispute arising under his contract.

5. The complainant is wrong. He admits to having received the letter of 24 June 1992 on 29 June. It set out explicitly the background to the case, described the efforts the Organization had made to get information and explanations before reaching a "final decision" and concluded with the express decision to terminate his appointment without notice or payment of indemnity. The further action he took and any proposals that may have been made to him did not cause the Organization at any time to go back on the final decision which it had taken, and for which indeed it had stated solid grounds. So the material date is 29 June 1992, when he had notice of that final decision, and that is when the ninety days began. The decision of 6 October 1992 did no more than confirm the earlier one and set off no new time limit for his appeal. Since he filed his complaint out of time it is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re SHARAPOV Judgment 1305

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mr. Evgeny Sharapov against the United Nations Industrial Development Organization (UNIDO), received by the Registrar of the Tribunal on 13 October 1992 and corrected on 21 December 1992, UNIDO's reply of 19 March 1993, the complainant's rejoinder of 26 April and the Organization's surrejoinder of 7 June 1993;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal, Articles 6 and 7 of the Rules of Court and UNIDO Staff Rule 103.04;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Russian, was born in 1934 in the former Soviet Union (USSR). He joined the staff of UNIDO, in Vienna, in 1983 under a fixed-term appointment for two years as an industrial development officer at grade P.4. His field was transport development and marine engineering. The Organization extended his appointment by further periods of two years in 1985 and 1987, stating in each letter of appointment that he was "on secondment" from the Government of the USSR.

In a memorandum of 28 April 1989 the chief of the Personnel Administration Section of the Personnel Services Division informed him that the Director-General wanted to extend his appointment, which was to expire on 30 November 1989, by another two years and that the Administration would be sending him the letter of appointment once it had medical clearance and "the consent of your Government to your continued secondment".

In response to the Organization's request for the Government's consent the Permanent Mission of the Soviet Union in Vienna informed the Administration by a communication of 16 June 1989 that the Government agreed to a one-year extension until 30 November 1990. On 23 June 1989 UNIDO offered to extend his appointment "on secondment" from the Soviet Government by one year from 1 December 1989 and the complainant accepted by signing the letter of appointment on 7 July.

A personnel officer saw him on 11 June 1990 and in a note for the file written on that day reported telling him that the Director-General had decided not to grant him any further extension because his department no longer needed anyone in his field. In a memorandum of 30 August to the chief of the Personnel Administration Section the complainant said that although his last contract had been shortened to only one year "because of the secondment" he had "never discussed" or agreed to secondment: he had in fact "retired" from the service of the USSR in 1983 before coming to UNIDO. Referring to changes in Soviet law and a recent ruling by the United Nations Administrative Tribunal, he said he wanted to be considered for further employment in UNIDO. In a memorandum of 18 September 1990 he asked the Director-General to extend his appointment at least until November 1991 as "originally intended in 1989".

In a memorandum of 24 September 1990 the chief of the Personnel Administration Section told him that his secondment - which, in any event, he had agreed to by signing the letter of appointment of 23 June 1989 - had nothing to do with the non-renewal, which was wholly due to the Organization's work programme.

In a memorandum of 15 November 1990 one of his supervisors, the Director of the Industrial Operations Technology Division, asked Personnel to extend the complainant's contract by three months "pending recruitment of his successor, who will have a different technical profile". In a memorandum dated 18 January 1991 the Administration informed him that it had extended his appointment by three months from 1 December 1990 to 28 February 1991. By a letter of 11 February 1991 he asked the Director-General for a further extension. A personnel officer refused it in a letter of 18 March, pointing out that the Director-General had already given him three months "to make private arrangements".

He appealed to the Joint Appeals Board on 6 May 1991. In its report of 29 February 1992 the Board recommended that the Director-General should reject the appeal. By a letter of 4 March the secretary of the Board submitted the report to the Director-General, who on 9 March wrote the words "I agree with the recommendations of the Joint Appeals Board" on the secretary's letter. On 9 March 1992 the secretary sent the complainant an unregistered letter informing him of the Director-General's decision. The date at which he got that communication, which he impugns, is unstated.

On 13 October 1992 Mrs. Judy Lavnick-Wainstead, the president of the Staff Union of UNIDO, sent a fax to the Registrar of the Tribunal saying that her office had sent the Tribunal on 18 May a "submission" from the complainant dated 14 May. The Registrar invited the complainant by a letter of 15 October to provide written evidence of the despatch of the "submission" of 14 May. In his reply of 5 November the complainant said he had "lost track" of his brief after entrusting it to the Staff Union in May 1992 and referred the Registrar to a letter of 5 November from the president of the Staff Union. In her letter the president asked the Registrar to "accept my word" that the complaint had been despatched "during the last days of May 1992".

B. The complainant submits that by refusing to extend his appointment UNIDO bowed to "unlawful interference" from the Permanent Mission of the USSR. He says his problems began in 1990, when he waged a campaign for "fair treatment" of citizens of the USSR who were employed in the United Nations system. That angered the Government, and when the Administration sought consent to extending his contract by another two years it got permission for only one.

After he submitted proof that he had severed contractual links with his former employer in 1983, UNIDO changed tack, alleging that what had prompted non-renewal was changes in its work programme, not problems over secondment. But there was ample work in his field to warrant keeping someone with his record of achievement on.

He seeks reinstatement or, failing that, a termination indemnity in the amount of eight months' gross salary, and continuing health insurance coverage.

C. In its reply UNIDO submits that the complaint is irreceivable because there is no proof of the filing of it within the time limit of ninety days in Article VII(2) of the Tribunal's Statute. The complainant himself admits to having lost track of it after leaving it with the Staff Union and so reveals "negligence and carelessness". At all events it was not for the Registrar to seek to determine the date of despatch: Article 7(4) of the Rules of Court empowers the Registrar to ask for only such corrections as are necessary to meet the requirements of Article 7, whereas proof of despatch is covered by Article 6(3). UNIDO "notes with approval" that the Registry has left blank the box on the complaint form for entering the "date of filing of the complaint".

On the merits UNIDO contends that in seeking government consent before extending the complainant's appointments it merely followed established practice. By waiting until August 1990 to tell the Administration that he was not on secondment he was in breach of Rule 103.04, which requires officials to inform UNIDO of any changes that may affect their status; in any event he is estopped from relying on a fact which he himself withheld. The Soviet Government had nothing to do either with his final extension - from 1 December 1990 to 28 February 1991 - for which UNIDO did not seek its consent, or with the non-renewal. Both decisions were at the Director-General's discretion, the non-renewal being due to the low priority of the complainant's work, which the General Conference described in 1989 as the sort that could be "curtailed or terminated during the biennium".

D. In his rejoinder the complainant identifies several mistakes of fact in the reply and develops his earlier pleas. He says that most of the projects he worked on in his last two years in the Organization had high priority. Deploring the length of the internal appeal proceedings, he questions the independence of the Joint Appeals Board, whose secretary is in charge of recruitment in the Personnel Services Division.

E. In its surrejoinder UNIDO contends that there are no new material facts or pleas in the rejoinder. It disagrees that most of his work fell in areas of high priority: the main part of his assignment, in keeping with his background, concerned "land-based and water-based transport equipment" and had low priority.

CONSIDERATIONS:

1. The complainant, who used to be on the staff of UNIDO, seeks the quashing of a decision which the Director-General of the Organization took on 9 March 1992 to terminate his contract of service. As a corollary he claims reinstatement in his former employment and payment of his salary since the date of separation, 28 February 1991, and up to reinstatement. Should reinstatement prove impossible, he seeks damages equivalent to eight months' pay and admission to UNIDO's health insurance scheme.

The background to the dispute

2. A citizen of what was then the Soviet Union, the complainant joined the United Nations - of which UNIDO formed

part at the time - in 1983 on the nomination of the Soviet Government and under a fixed-term appointment for two years. He had his contract extended in 1985 by two years and in 1987 by another two. In 1986 UNIDO became an independent specialised agency of the United Nations.

3. To each extension of his appointment the Organization sought the Soviet Government's prior consent through its Permanent Mission in Vienna. Each letter of appointment that the complainant countersigned bore the words "On secondment from USSR Government".

4. By an "inter-office memorandum" of 28 April 1989 the chief of the Personnel Administration Section told the complainant that the Director-General wanted to extend his appointment by another two years from 1 December 1989 but that the letter of appointment could be issued only after the Soviet Government had given its consent. Also on 28 April the Organization sent a memorandum to the Permanent Mission of the Soviet Union inviting it to seek the Government's consent to extension of the complainant's secondment to 30 November 1991. In its reply of 16 June 1989 the Mission said that the Government consented to seconding him only up to 30 November 1990.

5. UNIDO thereupon made out a letter of appointment on 23 June 1989 for a one-year extension from 1 December 1989 to 30 November 1990. As before the letter bore the words "On secondment from USSR Government". The complainant accepted on 7 July 1989. On 11 June 1990 the Personnel Administration Section told him that the Director-General had decided against extending his appointment further on the grounds that his work was not needed any more and his post would serve to recruit someone in a different area of work, and the formalities of termination would be carried out in due course.

6. In a memorandum of 30 August 1990 to the chief of the Personnel Administration Section the complainant said that he had been given an offer of renewal for two years, that the matter of his secondment had never been discussed with him and that he had never agreed to it. In a further memorandum of 18 September 1990 to the Director-General he pointed out that the extension had been docked to one year solely because of his "secondment" and that such status was "no longer valid" in the light of a judgment, No. 482, delivered by the United Nations Administrative Tribunal on 25 May 1990 on the Qiu, Zhou and Yao case.

7. In reply the chief of the Section sent the complainant a memorandum dated 24 September 1990. He acknowledged that the original offer had been for two years but explained:

> "As your Government approved the extension of your secondment to this Organization for one year, an extension

> of appointment for the corresponding period was offered to you."

He had accepted the terms - the memorandum went on - by signing the letter of appointment, and the reason why the Director-General had decided against further extension was "programmatic requirements" and had nothing to do with his "secondment".

8. Meanwhile the formalities of termination had gone ahead, but before they were completed the Director-General granted the complainant one last extension of three months, to 28 February 1991. Yet again the decision bore the explanation "extension of fixed-term appointment for three months on secondment from the USSR Government".

9. On 6 May 1991 the complainant lodged an internal appeal with the Joint Appeals Board of UNIDO. The Board reported to the Director-General on 4 March 1992. It held that throughout his successive appointments the complainant had been on secondment and he had accepted that status as long as he was being offered extensions. As to the abolition of his post after the expiry of the last extension, the Board found no inconsistency in UNIDO's position inasmuch as his own area of work was given "lowest priority" in the Organization's Programme for 1990-91. The Board therefore made "no recommendation in support of the appeal".

10. The Director-General rejected the appeal by writing a few words to that effect on the covering letter forwarding to him the text of the Board's report. The Organization says that the secretary of the Board sent him a photocopy of that letter on 9 March 1992. It is unknown at what date he received that decision.

The filing of the complaint

11. The time limit of ninety days in Article VII(2) of the Tribunal's Statute started on the notification to the complainant of the decision of 9 March 1992. Since the date of such notification does not appear on the evidence, he must be deemed to have had notice of the decision not later than the date at which he says he signed a communication filing his complaint with the Tribunal, i.e. 14 May 1992. Even if that latest possible date is taken to have set off the ninety-day time limit the complaint received at the Registry of the Tribunal was out of time.

12. Not until 13 October 1992 did the Registry get a fax from Mrs. Judy Lavnick-Wainstead, the president of the UNIDO Staff Union, including a photocopy of a complaint brief dated 14 May 1992 which she said she had despatched to the Tribunal on 18 May.

13. By a letter of 15 October 1992 the Registrar informed the complainant that the communication had not been received at the Registry and that in view of the date of the impugned decision the ninety-day time limit had presumably already expired. He quoted Article 6(3) of the Rules of Court: "In the application of paragraph 2 of Article VII of the Statute of the Administrative Tribunal, the date of despatch of the complaint shall alone be taken into account". He said that the complainant must provide written evidence of some kind, such as a photocopy of a receipt from the post office, to show despatch of his communication of 14 May 1992 before the ninety days had expired. The Registrar appended the Statute and Rules of Court, a set of forms for filing the complaint correctly and instructions on how to do so.

14. On 5 November 1992 the complainant sent back the forms, which showed many defects, together with several appendices. He was unable to offer any evidence to show that his complaint had been despatched on 18 May 1992, save a letter from Mrs. Lavnick-Wainstead saying that she remembered having "during the last days of May 1992" sent "a rather bulky package in a brown A4 envelope" but admitting she had not found "any record on our files" of such despatch. On 8 January 1993 the Registrar forwarded the complaint to the Director-General of UNIDO setting out the background and pointing out the flaws in the papers.

15. In its reply the Organization challenges the receivability of the complaint on the grounds that it was filed outside the time limit in Article VII(2) of the Tribunal's Statute. It further objects to the Registrar's "attempt to assist the complainant in meeting the deadline for filing" and helping him "to alter ex post facto information as to whether and at what date the complaint was received". It contends that the Registrar thereby exceeded his authority under Article 7(4) of the Rules of Court.

Receivability

16. In answer to the Organization's criticisms of the Registrar the Tribunal has the following comments to make. The Registrar's manifold responsibilities, which go far beyond the ambit of Article 7(4) of the Rules of Court, include the general task of maintaining relations between the Tribunal and the parties and the just as important task of ensuring proper compilation of records on cases lodged with the Tribunal. In performing those tasks the Registrar is empowered ex officio to take any action he deems fit to safeguard due process.

17. Since those who fall within the Tribunal's jurisdiction live far and wide and are free to plead their own case,

it is the Registrar's particular duty to see that complaints filed with the Tribunal are correctly presented and to offer a complainant such comment or advice as he thinks proper for the correction of the papers. In sending the complainant the letter summed up above the Registrar, so far from acting ultra vires, did what he was required to do.

18. Turning to the issue of receivability, the Tribunal observes that its Rules of Court are liberal in that for the purpose of reckoning the time limit Article 6(3) takes the date of despatch and thereby relieves the complainant of liability for any faulty transmittal after despatch.

19. That makes it the more important to establish the date of despatch beyond doubt in each case. As the Organization rightly points out, the complainant has failed to adduce any evidence of the despatch of his complaint. He says that at a time of emotional and physical distress he entrusted it to the Staff Union. But the explanation he offers on the issue does not allow of any assumption about the very point on which the timely filing of his complaint depends according to the Rules of Court, namely the date of despatch. Although the Tribunal does not question the sincerity of the complainant or the president of the Staff Union, it cannot treat their assertions as if they were objective evidence: if it did so it would be affording an opportunity for fraudulent evasion of time limits.

20. Although the complaint raises important legal and humanitarian questions, the Tribunal cannot but declare it irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re DER HOVSEPIAN (No. 2)
(Application for interpretation)

Judgment 1306

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for interpretation of Judgment 1235 filed by Mr. Tony Der Hovsépian on 1 April 1993, the reply of 6 May from the Universal Postal Union (UPU), the complainant's rejoinder of 8 June and the Union's surrejoinder of 9 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 4.3 of the Staff Regulations and Chapter XI of the Staff Rules of the International Bureau of the UPU;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant joined the staff of the International Bureau of the Universal Postal Union in 1965. By Judgment 1235 of 10 February 1993 the Tribunal quashed a decision by the Director-General of the Union upholding an earlier refusal to appoint him as head of Section C, which is in charge of services and transport. The Tribunal ordered the Union to pay him 25,000 Swiss francs "in moral damages" and 10,000 in costs. The Union paid him those sums in execution of the judgment but took the view that it had no further obligation thereunder and in particular was not required to order his retroactive appointment as head of Section C or promotion to grade P.5. He objects to its stand and applies to the Tribunal for interpretation of Judgment 1235.

2. As was held in Judgment 802 (in re van der Peet No. 10), an application for interpretation of a judgment is receivable only if the meaning of the Tribunal's ruling is uncertain or ambiguous. In this case the Union submits that under the pretext of an application for interpretation the complainant wants the Tribunal to judge his case again and that

in any event he has failed to follow the internal appeal procedure in Chapter XI of the Union's Staff Rules. It argues that on both scores the application is irreceivable.

3. The Union is mistaken. This is an application for interpretation, as the wording of the claims shows. It is receivable because the parties disagree on how to combine points 1 and 2 of the ruling in Judgment 1235, only the Tribunal itself may resolve the issue, and there was no need to follow any internal appeal procedure beforehand.

4. The complainant's case is that the quashing of the Director-General's decision of 28 November 1991 meant appointing him head of Section C or granting him personal promotion to grade P.5. The Union's answer is that the award of moral damages precluded the granting of his claim to appointment to the post he wanted.

5. Neither party is reading the judgment correctly. The complainant is wrong because the quashing puts the Union under no duty to grant him the appointment or promotion he wants, and the Union is wrong because the award of moral damages may not, in the absence of a declaration to that effect by the Tribunal, be deemed to preclude any sort of action by way of consequence of the quashing in point 1.

6. When a decision is quashed it is deemed never to have been taken. The Administration must do whatever the correction of the position in law may require and by due process take a new decision that is free from the fatal flaws in the quashed one and that gives effect to the Tribunal's ruling in the light of the reasoning that underlies it.

7. The quashed decision of 28 November 1991 upheld the earlier one not to appoint the complainant head of Section C. It was quashed because the Director-General had misconstrued Regulation 4.3 of the Staff Regulations by believing that he was bound to appoint an outside candidate to the post; because he had drawn clearly mistaken conclusions from the evidence; and because he had taken irrelevant issues into account. The quashing means that the complainant is entitled to have the Union review his right to appointment or to promotion in compliance with the material rules. The award of moral damages affords him redress for the injury the Union's unlawful act caused him up to the date of Judgment 1235; it does not relieve the Union of remedying that unlawful act by reviewing the matter of his rights, and this time doing so properly.

8. In the circumstances the Union must meet his costs, and the amount is set at 2,000 Swiss francs.

DECISION:

For the above reasons,

1. Judgment 1235 of 10 February 1993 shall be construed as stated in 7 above.

2. The Union shall pay the complainant 2,000 Swiss francs in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re MEYER

Judgment 1307

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Valérie Meyer against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 23 September 1992 and corrected on 29 October 1992, Eurocontrol's reply of 28 January 1993, the complainant's rejoinder of 29 March and the Organisation's surrejoinder of 1 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Articles 5, 30(2), 33 and 92(2) of the Staff Regulations governing officials of the Agency;

Having examined the written submissions and disallowed the complainant's application in her rejoinder for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 15 April 1991 Eurocontrol issued a "vacancy notice/notice of competition" for a clerk at grade C2 or C3 to serve as an assistant accountant. Under the heading "Additional information" it explained that any applicant with qualifications and experience that did not fully meet the stated requirements might be considered for appointment to the post at a lower grade, C4 or C5.

The complainant, a French citizen who was born in 1967, applied and was successful. By letter of 17 July 1991 Eurocontrol offered her the post at grade C5, step 1, and treated her reply of 22 July as acceptance. She took up duty on 1 August 1991 at Eurocontrol's Institute of Air Navigation Services in Luxembourg as a category 2 junior clerk at grade C5, step 1. Her letter of appointment, which was retroactive, was dated 2 October. At the end of six months' probation Eurocontrol made her an established official by a decision of 17 February 1992 that confirmed her appointment and grade.

On 11 May 1992 she submitted an internal "complaint" to the Director General under Article 92(2) of the Staff Regulations against his decision to put her at grade C5 on her becoming an established official by the decision of 17 February. By a letter of 25 June 1992, which she got on 7 July, the Organisation rejected that complaint as both out of time and devoid of merit. That is the decision she is challenging.

B. The complainant submits that her "complaint" of 11 May 1992 was in time: the notice of her confirmation, dated 17 February 1992, had reached her on 3 March. The letter of appointment of 2 October 1991 stated in paragraph 3 that her appointment was subject to confirmation on the completion of probation. In her submission the grant of an appointment is a provisional decision. Indeed the standard form for probation reports includes a section for the decision of the appointing authority, where the date of confirmation and the grade then granted are to be entered. So the final decision is the notice of confirmation.

The Director of the Institute of Air Navigation Services promised to have her grading corrected; so she was right to believe that the decision of 2 October 1991 was only provisional and would be put right at the end of probation. Eurocontrol was in breach of good faith in failing to tell her clearly that though her appointment to the vacancy on 2 October 1991 was provisional her grading was already final.

On the merits she submits that the post put up for competition was graded C3 or C2, her training and experience met the requirements exactly and the decision to confirm her appointment at grade C5 was not substantiated. By putting her first equal on its short-list the selection board acknowledged that she was fully qualified. Only if there had been no applicant with all the qualifications and experience required would the Organisation have been right to appoint a candidate at a grade lower than those advertised.

There was clear misappraisal of facts by Eurocontrol: before being appointed she had had fourteen months' experience as an assistant accountant, including six-and-a-half on temporary service with Eurocontrol.

According to Article 5 of the Staff Regulations certificates of secondary education qualify someone for category B. Grade 5 is the lowest for recruitment to category C, and that category requires only standard education anyway. The notice of vacancy advertised the post at C2 or C3 and called for secondary-school certificates - more than the job required - and, worse still, Eurocontrol gave her the lowest category, grade and step though she had a college diploma in management and accountancy.

She seeks the quashing of Eurocontrol's decision of 25 June 1992 to confirm her grading at grade C5, step 1, and costs.

C. In its reply Eurocontrol pleads that the complaint is irreceivable. The complainant was appointed at grade C5 on 2 October 1991. In compliance with the three-month time limit in Article 92(2) of the Staff Regulations she should have lodged her internal "complaint" by 3 January 1992. She did not do so until 11 May 1992. The notice of 17 February 1992 making her an established official set off no new time limit, being the mere confirmation of appointment that Eurocontrol sends at the end of probation to anyone who has come up to standard. Besides, she accepted both the post and grade C5 on 22 July 1991.

In subsidiary argument on the merits Eurocontrol submits that she misconstrues the function of a selection board and of the appointing authority and mistakenly accuses that authority of wrong assessment of her professional experience.

The appointing authority is not bound to endorse the selection board's order of preference. Under Article 33 of the Staff Regulations it appoints staff to "the basic grade corresponding to the posts for which they have been recruited". That was C5 in the complainant's case. Though the notice of vacancy said C2 or C3 because that is how the post is graded in the budget, the successful applicant was not necessarily to get either of those grades. Grade and step are subject to prior acceptance by the official, and Eurocontrol need not substantiate its decision, the less so since the appointing authority endorsed the selection board's order of preference. Article 30(2) of the Staff Regulations requires that reasons be given only "in the event of a selection being made which is not in conformity with the list drawn up by the Selection Board".

The complainant's personal history form shows that she spent less than two years in temporary service in ill-defined junior jobs given to beginners. The Director of the Institute in Luxembourg was consulted before the post was offered to her at C5 to make sure she was being put more or less on a par with other young employees with like experience. When applicants are equally well qualified experience is decisive. There was nothing unlawful about the complainant's appointment and besides, she is now earning much more than before.

D. In her rejoinder the complainant maintains that her complaint is receivable and cites rulings by the Tribunal that a provisional decision is not challengeable. In her submission it would be wrong to expect someone new to file an internal "complaint" while on probation and so run the risk of a bad report.

She enlarges on her pleas on the merits.

She asks the Tribunal to order disclosure of the comments made by the Director of the Institute at the time of her recruitment and of minutes written about her appointment and grading by several directors.

E. In its surrejoinder the Organisation develops its pleas on receivability and on the merits.

CONSIDERATIONS:

1. The complainant, an official of Eurocontrol, seeks the quashing of the notice of confirmation of appointment she was given on 17 February 1992 on her completion of probation insofar as it put her at the first step in grade C5. She argues that she was entitled to grade C3 both because of the terms of the "vacancy notice/notice of competition" of 15 April 1991 which prompted her to apply and because of her own qualifications as acknowledged by the selection board.

2. The defendant Organisation raises two preliminary objections to receivability:

(a) that its decision of 17 February 1992, being mere confirmation of the appointment she had been granted on 2 October 1991, set off no new time limit for appeal;

(b) that in any event she consented to grade C5 by accepting appointment and may not therefore properly challenge her grade *ex post facto*.

Receivability

3. The defendant's objections call for the following comment. The notice of 15 April 1991 announced a competition for a vacancy for a clerk at grade C2/C3 to serve as an "assistant accountant". After describing the duties the notice set out the required qualifications but explained that

applicants with qualifications and experience that did not fully measure up might be considered for appointment at grade C4 or C5.

4. The complainant having come first equal in the competition, Eurocontrol offered her the appointment in a letter sent on the Director General's behalf on 17 July 1991. What it offered her was "a post for a category 2 junior clerk at step 1 in grade C5" and it gave details of pay. Appended in four copies was a "letter of appointment" which it asked her to sign and return. She was to take up duty on 1 August 1991.

5. By a handwritten letter of 22 July she sent back the copies of the letter without signature or comment. Eurocontrol having treated that as acceptance of its offer, she took up duty on 1 August. When making out her contract the Organisation found that she had omitted to sign its letter and it thereupon asked her to do so so that it could draw up the appointment. She eventually signed on 24 September 1991 and the contract was made out on 2 October with effect from 1 August 1991.

6. After duly completing probation she had her appointment confirmed by the decision of 17 February 1992 and on 11 May 1992 she filed an internal "complaint" against appointment at C5. She pointed out that she had applied in answer to a notice announcing a post at C2/C3 and the selection board's choosing her confirmed that she met all the requirements in the notice.

7. She had her appeal rejected by a reasoned decision of 25 June 1992 which she got on 7 July, and that and the letter of confirmation of 17 February 1992 are the decisions she is impugning.

8. The defendant's objections to receivability are sound.

9. It appears from the foregoing that what the complainant was offered was appointment at C5 and she accepted it, before being actually appointed, by signing the letter of appointment. She thereby surrendered her right to challenge *ex post facto* any clause of the contract of service which she freely consented to and which was the prerequisite of her becoming a Eurocontrol official.

10. So it is plain that she would not have been free to challenge the letter of appointment even if she had filed her internal "complaint" in time. *A fortiori* she was not free to challenge the decision to make her an established official on

the conclusion of probation. Insofar as it related to her grading that decision did no more than confirm the letter of appointment. So her complaint must fail in any event because it is irreceivable

11. For that reason her application for disclosure of evidence serves no purpose.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

William Douglas P. Pescatore E. Razafindralambo

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re HO | Judgment 1308

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jong Nak Ho against the World Health Organization (WHO) on 8 December 1992 and corrected on 15 January 1993, the WHO's reply of 8 March, the complainant's rejoinder of 12 April and the Organization's surrejoinder of 25 May 1993;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and WHO Staff Rules 510.1 and 1230.8.1;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The Pan American Health Organization (PAHO) in Washington D.C. serves as the World Health Organization's Regional Office for the Americas. The complainant, a citizen of the United States born in 1934, joined the PAHO in 1972 as a clerk in the Department of Finance and Accounts at grade G.5. PAHO promoted him to G.6 in 1974 and to G.7 and then to G.8 in 1975. It reclassified his post in 1977 and made him finance officer at P.2. On 1 March 1984 he became an official of the WHO. He was promoted to grade P.3 as finance officer in the Imprest Accounts Unit of the Department of Finance and Accounts.

Early in 1990 the Regional Director had a private firm look into the management of the department. In a report of 27 March 1990 the firm recommended, among other things, revising the organisation chart. At a meeting with supervisory staff in July 1990 the Regional Director handed out a new organisation chart and told the complainant that he was to be put on another post at grade P.2. By a memorandum of 31 July he asked the chief of department to explain why he was to have a post at a lower grade; he said he would like one of the available P.3 posts in the Staff Benefits Section of the department. In a memorandum of 2 August the chief of department told him that inasmuch as there was no suitable P.3 vacancy his assignment to a P.2 post would be "logical"; nevertheless he would keep his P.3 grade.

A memorandum of 6 August that the chief sent to everyone in the department said that "the new basic structure of the Department is final" although there were still "many things to be done" before the new staffing plan could come off.

Replying in a memorandum of 24 August 1990 to further queries from the complainant, the chief of the Office of Administration confirmed his new assignment and said that the reclassification of his post and his request for assignment to another P.3 post would be considered later.

The complainant appealed on 20 December 1990 to the Regional Board of Appeal in Washington. In its report of 16 May 1991 the Board held his appeal to be irreceivable on the grounds that there had been no final decision and he had suffered no loss in grade. The Regional Director having endorsed that view, he put his case to the headquarters Board of Appeal in Geneva on 20 August 1991. In October 1991 the chief of Personnel approved the complainant's revised post description, which set his grade at P.3. In its report of 10 July 1992 the headquarters Board described the appeal as premature and recommended rejection. In a letter of 31 August 1992, which the complainant impugns, the Director-General endorsed the Board's recommendation.

B. The complainant submits that his transfer to another unit amounted to a downgrading and was in breach of the terms of his appointment. The Organization has a duty under Staff Rule 510.1 to take account of an official's "particular abilities and interests" before deciding on transfer. Yet it failed to consider his seniority and good record and his interest in other available P.3 posts.

He alleges breach of his right to a hearing in that the Administration failed to discuss the prospect of transfer with him. Instead it sprang "de facto demotion" on him and so caused him humiliation and distress.

He seeks the quashing of his transfer, assignment to a post that matches his grade and seniority, moral damages in the amount of 50,000 United States dollars and costs.

C. In its reply the WHO submits that the complaint is irreceivable because the action complained of was not final: Staff Rule 1230.8.1 says that action is final only "when it has been taken by a duly authorized official and the staff member has received written notification". A directive, No. 78-10 of 4 May 1978, further stipulates that final action on appointment status and employment conditions shall be a decision "by the

Chief of Personnel on behalf of the Organization". Whatever information the complainant may have got about the reform of the department he had no notice from the chief of Personnel of his transfer or changes in his duties and grade. On the contrary his supervisor made it plain that there were "many things to be done" before the reorganisation took effect. At most the impugned decision might be seen as just one step in a complex procedure of which only the eventual outcome would be challengeable.

In subsidiary submissions on the merits the WHO denies the complainant's allegation that it reclassified his post from P.3 to P.2. Not only has he produced no evidence of any personnel action or final decision but the memorandum of 24 August 1990 which he supplies contains an assurance from the chief of his department that "In the meantime, there would be no change [in his post] from its present P.3 status". In fact the Administration confirmed on 11 October 1991 that the duties and responsibilities of his post warranted P.3.

Even supposing there was a decision to transfer him to another post, it did take account of his abilities and interests since his original post and the revision of October 1991 cover the same area, finance and accounts. Inasmuch as his post remained at P.3 throughout the material period he has not sustained any injury. There being neither final decision nor injury, the complaint is vexatious.

D. In his rejoinder the complainant contends that he has been transferred from a post of "finance officer" in which he supervised imprest accounts to one of "accounts officer" in which he is supervising operations in the Headquarters Services Unit. The only reason why there was no personnel action was that the Administration "intentionally" refrained from issuing one. But the duties and supervisory responsibilities set out in the revised post description of October 1991 are "quite different". Although the WHO may not have reduced his grade it has lowered his status: instead of reporting to the chief of section he now reports to a unit chief whose grade is the same as his own. He presses his claims.

E. In its surrejoinder the WHO observes that the rejoinder raises no new questions of fact or of law that call for comment. What is at issue is not the rank of the supervisor the complainant reports to but whether the chief of Personnel notified any final decision to him which had the effect of putting him at a lower grade. On that score he himself admits that he has not been downgraded.

CONSIDERATIONS:

1. The complainant joined the Pan American Health Organization (PAHO) in 1972 as a finance clerk at grade G.5. In 1984 he became an official of the WHO, though he remained in the PAHO in its capacity as the WHO's Regional Office for the Americas. He was thereupon promoted to P.3 as finance officer and put in charge of imprest accounts in the department of Finance and Accounts. This complaint is about his transfer to other duties in the context of a reorganisation of the department and in circumstances that he considers make that transfer tantamount to downgrading.

2. An outside firm which the Regional Director had commissioned to study the management of the department submitted a report in March 1990 recommending reforms. On 24 July 1990 the Regional Director met the senior staff of the department and distributed a new organisation chart. The complainant was appointed supervisor of the Headquarters Services Unit, the functions of which were different from those of the Imprest Accounts Unit, and put on a post that was graded P.2.

3. In a memorandum of 31 July 1990 to the chief of department he expressed dissatisfaction; sought clarification about the functions of the Headquarters Services Unit and his new duties; asked whether he was being downgraded to P.2 and what the basis and reasons were for reassigning him to a P.2 post; and, observing that two P.3 posts were available in the Staff Benefits Section of the department, applied for transfer to one of them.

4. He was told to go to his new unit on 1 August 1990 and duly did so. During that month the two parties amply discussed the changes orally and in writing. In a memorandum of 2 August the chief of department explained to him that the "realignment of functions" was "a direct result of the significant technical changes in data transfer methodology from field to Headquarters" and was intended to make for greater efficiency in the department, and he asked the complainant to see two other officials so as to "develop an appropriate description of duties". For the time being, the chief of department went on, grade P.2 was "considered appropriate ... for the duties and responsibilities assigned" to the complainant's new post, though he would continue to hold grade P.3. His transfer to a P.3 post in the Staff Benefits Section was rejected on the grounds that in view of his skills and experience his "continued assignment to an operational accounting position" was thought to be in the Organization's best interests. The complainant replied in a memorandum of 14 August to the chief of the department and also wrote a memorandum on 22 August to the chief of Administration again

asking for transfer to one of the two P.3 posts in the Staff Benefits Section. After further discussion the chief of Administration confirmed in a memorandum to him of 24 August that "next summer we would re-evaluate the question" as to whether or not reclassification of his post was required, but that "in the meantime, there would be no change from its present P.3 status"; as for the two P.3 posts in the Staff Benefits Section, they were "not options at this time".

5. Treating the memorandum of 24 August 1990 as a final decision, the complainant appealed in December 1990 to the WHO's Regional Board of Appeal in Washington alleging "irregular transfer, demotion of duties, and failure to bring new post to a selection committee". In its report dated 16 May 1991 the Regional Board held that his appeal was irreceivable because no final decision had been made and no description of his post issued. The Regional Director endorsed that view in a letter to him of 2 July 1991.

6. On 20 August 1991 the complainant appealed against that decision to the WHO's headquarters Board of Appeal in Geneva. While that appeal was pending, the description of his post was issued on 11 October 1991. In its report, which is undated, the headquarters Board agreed that the complainant's appeal to the Regional Board had been irreceivable and the Director-General accepted its view in the decision of 31 August 1992 that he now impugns.

7. It is not in dispute that the reorganisation of the department and the reassignment of the complainant were in the Organization's interests: his grievance was that he was being downgraded. The memorandum of 24 August 1990 from the chief of Administration informed him that although there would in the meantime be no change in the grading of his new post the question would be reviewed in the summer of 1991. That makes it plain that no final decision had yet been taken on grading his new post P.2 and that the two Boards of Appeal were therefore correct in holding his appeal to be premature and irreceivable. That being so, his complaint too must be declared irreceivable under Article VII, paragraph 1, of the Tribunal's Statute because what he is challenging is not a "final" decision.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

P. Pescatore

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

SEVENTY-SIXTH SESSION

In re AHMAD (No. 3)
(Application by UNESCO
for review)

Judgment 1309

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 2 November 1993 for review of Judgment 1298 (in re Ahmad No. 2);

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 8, paragraph 3, of the Rules of Court;

Having examined the written submissions;

CONSIDERATIONS:

1. By Judgment 1298 of 14 July 1993 the Tribunal allowed Mr. Rashid Ahmad's second complaint against the United Nations Educational, Scientific and Cultural Organization. The facts of the case are fully set out in that judgment. The Tribunal quashed the decision by the Director-General of UNESCO not to renew Mr. Ahmad's fixed-term appointment at grade D.1. Its reasons for doing so were:

(a) that Rule 54.1 of the Rules of Procedure of UNESCO's Executive Board required the Director-General to consult the Board's members both when he decided to renew the contract of an official at D.1 and above and when he decided not to do so;

(b) that Staff Rule 104.11 bis required that written performance reports be prepared for all staff members, including officials at D.1, and the Organization had failed to satisfy that requirement in Mr. Ahmad's case; and

(c) that the Director-General had drawn clearly wrong conclusions from the evidence and had overlooked material facts.

The Tribunal ordered the Organization to reinstate the complainant "as from 1 February 1992 in a post at grade D.1

under a fixed-term appointment that will expire two years from the date of this judgment". It also awarded him 3,000 United States dollars in costs.

2. UNESCO seeks review of that judgment on the grounds that the Tribunal "failed to take essential material facts into account". Its principal contention is that "in its interpretation [of Rule 54.1 of the Executive Board's Rules of Procedure] the Tribunal seems to have omitted to take into account an aspect of fundamental importance: the well-established and consistent practice of the Organization in that regard, which is that the Director-General does not, nor is he in any circumstances deemed to be required to, consult the members of the Executive Board regarding the non-renewal of a contract of officials at D.1 and above". The Organization puts forward the subsidiary pleas, first, that "lesser importance ... may be said to be attached to the establishment" of reports on the performance of UNESCO officials in Mr. Ahmad's grade and category; and, secondly, that the Director-General "was in a position personally to judge the manner in which" Mr. Ahmad had been performing his functions and could "elaborate on this in detail orally, if necessary".

3. The Tribunal will follow the principles it set forth in Judgments 442 (in re de Villegas No. 4), and 704 (in re Verron No. 2), among others, in entertaining applications for review. In Judgment 704 it declared, under 2:

> "The Tribunal's judgments carry the authority of res judicata. They are, however, subject to review on application either by the complainant insofar as he is not satisfied or by the defendant organisation when its decision is set aside or it is ordered to pay damages. Whichever party is the applicant, the Tribunal will review a judgment only in exceptional cases. Such is the rule of all jurisdictions which allow review. For that reason several pleas are inadmissible as grounds for review, such as allegations of error of law or misappraisal of the evidence. Nor does the failure to hear evidence or to rule on pleas submitted by the parties afford admissible grounds for review.
>
> Other pleas may be admissible provided they may have an effect on the Tribunal's decision. Examples are failure to take account of specific facts, material error, i.e. a mistaken finding of fact which does not involve any value judgment and is therefore distinguishable from misappraisal of evidence, failure to rule on a claim and the discovery of some "new fact", i.e. a fact which one of the parties was not able to rely on in the proceedings that culminated in the judgment."

4. The answer to UNESCO's principal plea is that, whatever its practice may have been, the Tribunal interpreted Rule 54.1 of the Rules of Procedure as it saw fit. What the Organization is seeking is review on the grounds of an alleged mistake of law, and that is not an admissible plea for review. Besides, even supposing that the plea were upheld, the Tribunal's ruling would still stand because it rested on two other independent grounds as well.

5. UNESCO's first subsidiary plea is about the relative weight to be given to reports on the performance of D.1 officials. But the plea cannot in any way mitigate or remedy its utter failure to comply with the requirement of Staff Rule 104.11 bis.

6. By its second subsidiary plea the Organization is seeking to adduce additional evidence, not of new facts, but of circumstances which the Organization could and should, if it so wished, have relied on in its pleadings on the original case. So again neither plea affords admissible grounds for review.

7. In sum, according to the principles that the Tribunal consistently abides by in ruling on such applications UNESCO's allegations do not amount to admissible pleas for review, nor can they have any effect on the Tribunal's rulings in Judgment 1298. The Tribunal therefore summarily dismisses the Organization's application as being clearly irreceivable within the meaning of Article 8(3) of the Rules of Court.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

William Douglas

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re KIGARABA (No. 2)
(Application for execution)

Judgment 1310

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1228 filed by Mr. Richard Kigaraba on 3 August 1993, the reply of 6 September from the Universal Postal Union (UPU), the complainant's rejoinder of 30 September and the UPU's surrejoinder of 2 November 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Rule 111.3 of the Staff Rules of the International Bureau of the Union;

Having examined the written submissions;

CONSIDERATIONS:

1. The complainant has been employed by the International Bureau of the Universal Postal Union (UPU) since 1983. He is now on a post as first secretary at grade P.3. Since 1990 he has been in dispute with the Union over the refund of expenditure in the 1989-90 school year on textbooks for his daughter and son.

2. Charges against him of having made a "false declaration" were referred to the Disciplinary Committee. The upshot was that on 13 November 1990 the Director-General ordered his "delayed advancement to the next salary step", a severer sanction than the "written warning" the Committee had recommended. On 21 December 1990 he appealed against the sanction to the Joint Appeals Committee. It too recommended a written warning, but by a decision of 19 April 1991 the Director-General upheld the sanction he had already imposed.

3. In an interlocutory judgment, No. 1188 of 15 July 1992, on Mr. Kigaraba's first complaint the Tribunal ordered the Union to produce the reports of the Disciplinary Committee

and the Joint Appeals Committee. In Judgment 1228 of 10 February 1993 on that complaint it set aside the decision of 19 April 1991 and sent the case back to the UPU for a new decision on the grounds that the Joint Appeals Committee had failed to communicate the Disciplinary Committee's report to the complainant and had thereby infringed his right of defence.

4. On 12 March 1993 the Director-General sent him the report and invited him to lodge a new appeal. On 18 March he refused to do so, and the Director-General himself put the case to the Joint Appeals Committee. In a report of 18 June the Committee said that, since the complainant himself had lodged no formal appeal with it, it could not give an opinion on the case. The Director-General rejected that conclusion and on 14 July again called upon the Committee to take up the case.

5. Instead of awaiting the outcome of the proceedings the complainant came straight to the Tribunal by filing this complaint on 3 August 1993. The Committee commented again on the case in a note dated 20 August and in a report which was submitted to the Director-General on 27 September 1993.

Receivability

6. The complainant's main claims are to:

(1) restoration of his right to step advancement as from 1 December 1990;

(2) payment of a lump sum of 450 United States dollars against the cost of the textbooks for his children;

(3) a fair award of damages for moral injury; and

(4) costs.

He makes subsidiary claims to damages for injury caused by the Director-General's refusal to take a new decision on his advancement, again with moral damages and costs.

7. The Union pleads that all his claims are irreceivable on the grounds that the quashed decision of 19 April 1991 must be replaced by a new one to be taken after due internal process, i.e. in accordance with prescribed UPU procedure and after the Joint Appeals Committee has again reported.

8. The plea succeeds. The Tribunal set aside the decision of 19 April 1991 because of the flaw in the Appeals Committee proceedings, namely the failure to disclose the Disciplinary Committee's report to the complainant. The effect of that was to restore the status quo ante. In other words,

the Joint Appeals Committee still had before it the appeal which the complainant had filed on 21 December 1990, in accordance with Rule 111.3 of the Staff Rules, against the Director-General's decision of 13 November 1990. The proper execution of Judgment 1228 therefore required the Committee to take up that appeal once again. The complaint is therefore premature and irreceivable, and the claims fail in their entirety.

9. Besides, as the Union points out, he has put claim (2) - to the refund of the cost of the textbooks - for the first time to the Tribunal, and it did not specifically form part of any appeal to the Appeals Committee. For that reason alone it is in any event irreceivable because he has failed to exhaust the internal means of redress.

DECISION:

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re GUERRA ARDILES

Judgment 1311

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Sergio Guerra Ardiles against the European Southern Observatory (ESO) on 19 April 1993, the ESO's reply of 4 July, the complainant's rejoinder of 5 August and the Observatory's surrejoinder of 15 September 1993;

Considering the applications to intervene filed by Mr. Ricardo Otto Escobar and Mr. Enrique Scherer Saavedra on 6 June 1993 and the ESO's comments thereon of 2 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 17, paragraph 2, of the Rules of Court, and Articles LS II 5.06 and LS VI 1.05 of the Regulations for ESO Local Staff in Chile and Articles 1.01 and 1.02 of Annex 3 and Article 1.01 of Annex 16 to those Regulations;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The main rules relevant to this case are in Articles 1.01 and 1.02 of Annex 3 and Article 1.01 of Annex 16 to the Regulations for ESO Local Staff in Chile and they are reproduced in full in 3 below. They provide for paying to such staff on termination a service indemnity which, where the period of service exceeds two years, amounts to one month's salary for each year up to a total of eighteen, "salary" denoting "basic salary without considering overtime or special allowances". All local staff are also entitled to "5 basic salaries" a year known as "aguinaldos" or "gratifications", and any who are stationed at the ESO's astronomic observatory at La Silla in the Chilean Andes get "one basic salary as a mountain compensation" each year.

The complainant, a Chilean citizen born in 1928, joined the local staff of the ESO in November 1964 as an assistant mechanic at La Silla. His appointment ended on 28 February 1993 when he reached the retirement age set in Article LS II 5.06 of the Regulations for ESO Local Staff. His original contract, which came into force before the Observatory had its own regulations for local staff, was governed by Chilean labour law. On 23 June 1972 he signed a contract to which the Regulations for ESO Local Staff in Chile were to apply from 1 January 1972.

On 7 January 1993 the Administration sent him a reckoning of his terminal entitlements based on "basic salary" and 18 years' service. On 12 January he objected on the grounds that it should have taken account of the "gratifications" paid under Annex 16 to the Regulations for ESO Local Staff and should have covered his almost 29 years' service at the Observatory. The Head of Administration replied in a letter of 11 February on the Director General's behalf that the reckoning was in keeping with the material provisions.

In a letter of 24 February he appealed to the Director General under Article LS VI 1.05 of the Regulations. The Director General rejected the appeal in a letter of 25 March 1993, the decision he is impugning.

B. The complainant submits that the ESO's reckoning of his terminal entitlements was unlawful. The Observatory was wrong to exclude from the reckoning the six basic salaries he received under Article 1.01 of Annex 16 to the Regulations: five of them as "aguinaldos" and the sixth as "mountain compensation". He also contends that the ESO erred by limiting the reckonable period of his service to 18 years.

"Salary" within the meaning of Article 1.01 of Annex 3 includes the allowances prescribed in Annex 16. Unlike overtime payments and such special allowances as language, nightwork and family allowances, they form part of basic pay and count in reckoning social security contributions.

The ESO's exclusion of one-third of his earnings from the reckoning is also in breach of his acquired right to the terminal indemnity due under Chilean labour law, which governed the contract he got in 1964. Under that law he was entitled to a terminal indemnity reckoned on the basis of the full period he spent in the ESO's employ, not just 18 years. The ESO discriminated against him by discounting each year of service beyond the eighteenth. Besides, it granted indemnities ex gratia to another official for 28 years of service even though the complainant had served just as long.

He asks the Tribunal to quash the impugned decision and to order payment to him of a terminal indemnity equivalent to 29 months' salary, including the allowances due under Annex 16. He also seeks costs.

C. In its reply the ESO contends that no provision of Annex 3 warrants taking "salary" to mean anything but the "basic salary" as shown in the salary scales. Had the draughtsman intended that the reckoning be based on one-twelfth of all the basic salaries an official received the text would have said as much.

As to the complainant's reliance on an acquired right to 29 months of salary under Chilean law, the ESO points out that the parties signed a contract to be governed by the Regulations for ESO Local Staff as from January 1972. Having had the benefit of those Regulations for some twenty years, the complainant may not now turn to national law to secure a benefit that they do not afford. The rule limits the indemnity to "eighteen salaries": it is immaterial that at his discretion a former Director General awarded another official 28.

D. The complainant rejoins that if the draughtsman had intended Article 1.02 of Annex 3 to cover only "basic salary" he would have said so. The amendment which was made in May 1972 in the complainant's contract of service and which said that the Regulations for Local Staff were to apply as from January 1972 did not affect acquired rights: by stating the date on which he had originally joined the staff the contract implied "an obvious reserve of rights". So the complainant presses his claims to an indemnity based on 29 monthly salaries. What the ESO calls "discretion" was actually misuse of authority since it put another official's indemnity at 28 months' pay, whereas he gets only 18.

E. In its surrejoinder the ESO develops its earlier pleas and points out that the decision on the other official's indemnity was an exceptional one: it related to an individual case and constituted neither an affirmation of policy nor a binding precedent.

CONSIDERATIONS:

1. The European Southern Observatory employed the complainant from 1964 as a member of its local staff in Chile. He retired at the prescribed age of retirement, which is 65,

in 1993. He had by then been serving for 29 years and the dispute is over the amount of his terminal indemnity. The Regulations for ESO Local Staff determine that amount by reference to the total period of the staff member's service and reckon it at the rate of one month's salary, up to a maximum of 18, for each year of service.

2. The complainant is challenging a decision of 25 March 1993 by the Director General insofar as in reckoning his terminal indemnity it discounted the additional payments known as aguinaldos and the full period of his service, namely 29 years and not just 18. He has duly followed the internal appeal procedure and the receivability of his complaint is not at issue. Two other former members of the local staff who retired earlier than he in similar circumstances have applied to intervene.

3. The provisions on service indemnity in Annexes 3 and 16 to the Regulations for Local Staff read:

> "Indemnities for years of service with ESO
>
> A 3 - 1.01
>
> In case the Organisation or a Local Staff Member terminate the contract, the following indemnities shall be paid:
>
> - for the two first years of service: 15 days of salary per year;
>
> - for service longer than two years: 1 month salary for each year of service;
>
> ...
>
> - salary in the meaning of the text above shall be the basic salary without considering overtime or special allowances.
>
> A 3 - 1.02
>
> The indemnity paid may not exceed the amount of eighteen salaries of a Local Staff Member. ...
>
> Aguinaldos
>
> A 16 - 1.01
>
> All Local Staff Members are entitled to receive 5 basic salaries per year as a special gratification.

> These gratifications shall be paid in February, July, September and December of every year.
>
> In addition, Local Staff Members working on La Silla shall receive one basic salary as a mountain compensation ..."

4. The Observatory argues that the rules are explicit: Article 1.01 of Annex 3 says that the amount that is to count in determining the indemnity is "the basic salary without considering ... special allowances" of any kind. The aguinaldos are said in Article 1.01 of Annex 16 to be "a special gratification". So, a fortiori, is the so-called "mountain compensation" that is paid in the form of an aguinaldo equivalent to one month's basic salary. The rules are no less explicit about the number of monthly payments to be granted for years of service: the maximum is 18.

5. On the definition of "salary" the complainant points out that aguinaldos are identical to basic salary in that they are the equivalent of monthly payments and are paid at set dates. So in his submission the monthly payments of salary made in accordance with the pay scales and the aguinaldos have to be combined to give the actual figures of monthly pay that count in reckoning the indemnity. That, he says, was indeed the thrust of Judgments 507 (in re Azola Blanco and Véliz García) and 508 (in re Acosta Andres), which declared that aguinaldos were to count in reckoning contributions the ESO was bound to make for local staff under a national social security scheme.

6. As to the reckonable period of service the complainant has two arguments. The first is that he was originally appointed under a contract that was subject to Chilean law, and that law says that for such a contract the service indemnity shall depend on the total number of years of service. Secondly, he cites the case of someone in the same position as he who was recently granted a service indemnity based on the full period of his service. So it would, he maintains, be only fair to put him on a par.

The meaning of "salary" under the Regulations

7. The term "salary" is to be so construed that there is proper consistency between the various relevant provisions of the Local Staff Regulations. The main one is the last clause of A 3 - 1.01, which distinguishes between "the basic salary", which is to count in reckoning the service indemnity, and "special allowances", including payments for overtime, which are not to count for that purpose.

8. The hallmark of "basic salary" is that it takes the form of regular and uniform payments to local staff by virtue

of their status as such, according to prescribed scales and at set dates. The "special allowances" are distinguishable by being due only in particular circumstances that are usually peculiar to each staff member: examples are the family, language, transport, holiday and death allowances and - an example the Regulations actually give - payments for overtime.

9. In determining the amount of basic salary as so defined as against the special allowances what counts is sums actually paid in salary, whatever they may be called and whatever method of accounting may be applied. So it is quite wrong of the Observatory to reduce the staff's financial entitlements by arbitrarily treating as a "gratification" what is in fact an item of regular pay due under the Regulations.

10. True to the spirit of its rulings in Judgments 507 and 508 on social benefits, the Tribunal concludes that aquinaldos form part of the basic salary that counts in reckoning the service indemnity where they are a regular additional item of pay. Being such an additional item, the "5 basic salaries" referred to in Article 1.01 of Annex 16 must be added to the yearly total paid according to the scales for the purpose of determining the "basic salary" that is relevant in reckoning the indemnity.

11. A further conclusion is that the "mountain compensation" prescribed in the third clause of Article 1.01 of Annex 16, being due only in particular circumstances of the kind mentioned in 8 above, is a special allowance within the meaning of Article 1.01 of Annex 3 and is therefore irrelevant in reckoning the indemnity.

The reckonable period of service

12. The complainant puts forward two pleas in favour of counting his full 28 years' service, instead of the maximum of 18 set in the Regulations, for reckoning his indemnity.

13. He first points out that when he was recruited in 1964 his contract of service was subject to Chilean law. He therefore claims the benefit of a Chilean Statute, No. 19.010 of 29 November 1990, which guarantees payment of severance indemnity to workers recruited before 14 August 1981 without setting any limit on the reckonable period of service.

14. The Observatory's answer is that in 1972 the complainant signed a new contract that was based on the Local Staff Regulations and so the provisions of those Regulations replaced national law.

15. The defendant's plea is sound on that issue. As a rule the conditions of employment of staff are subject

exclusively to the ESO's own Staff Regulations and to the general principles of the international civil service: see Judgments 322 (in re Breuckmann (No. 2)) under 2; 473 (in re Haas) under 2 and 3; and 493 (in re Volz) under 5. National laws, and in particular those of the host country, apply only where there is express reference thereto. In this instance the terms of the complainant's appointment have clearly been subject to the ESO's own rules since 1972.

16. The complainant's second plea is that the Director General recently granted another staff member "as a discretionary measure" a service indemnity that took account of the full period of service and amounted to 28 monthly payments instead of the maximum of 18 set in Article 1.02 of Annex 3. So he wants to be given the same treatment.

17. The ESO does not deny that allegation but explains that the other staff member was so treated as a favour by the Director General's predecessor a few days before he himself left. The Director General could do nothing about it but has no intention of making that favour a general rule.

18. An indulgence of that kind, which reveals that there was no, or no proper, process of internal auditing in the ESO, is deplorable. Yet the consecration of such blatant dodging of the rules of social justice would be inadmissible and the complainant's claim to like treatment must therefore fail.

The applications to intervene

19. Two former staff members, Mr. Escobar and Mr. Scherer Saavedra, who are engineers and were locally recruited to serve the ESO at La Silla, have applied to intervene in the complaint. They say that they are in the same position as the complainant in that when they left they had their service indemnities reckoned in the same way and therefore without counting the aguinaldos, five of them being basic salary and one the "mountain compensation".

20. The ESO replies that the applications are irreceivable because it determined the interveners' entitlements when they left and appeal is now out of time. Moreover, they fail to give the details and evidence the Tribunal would need to make a proper ruling on their entitlements.

21. The ESO's objections are sound. According to Article 17(2) of the Rules of Court "Any person to whom the Tribunal is open under article II of its Statute may apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given". It appears from the wording of

the applications that the interveners' cases were settled once and for all when they left the ESO. Their entitlements are therefore beyond challenge and this judgment may neither reduce nor increase them. The applications fail.

DECISION:

For the above reasons,

1. The Director General's decision of 25 March 1993 on the complainant's service indemnity is set aside.
2. The case is sent back to the Observatory for a new decision in line with the above considerations.
3. The complainant shall be paid 2,000 United States dollars in costs.
4. His other claims are dismissed.
5. The two applications to intervene are dismissed as irreceivable.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

William Douglas P. Pescatore Mark Fernando

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL — INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF — *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re JIANG — Judgment 1312

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Yue Jiang against the International Atomic Energy Agency (IAEA) on 15 March 1993 and corrected on 20 April, the IAEA's reply of 25 June, the complainant's rejoinder of 30 July and the Agency's surrejoinder of 5 October 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles VII, paragraphs C and F, and XV of the IAEA's Statute, Regulations 3.03(c) and 7.02 and Rules 7.02.1 and 12.01.1(D)(1) of the IAEA's Provisional Staff Regulations and Staff Rules and IAEA circular SEC/NOT/8 of 2 March 1960;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the People's Republic of China, joined the International Atomic Energy Agency on 27 February 1988. He was granted a fixed-term appointment as a translator at grade P.3 in the Chinese section of the Division of Languages. His appointment was to expire on 26 February 1991. He had previously been working at the Information Centre of the Chinese National Nuclear Corporation.

In accordance with Regulation 7.02 and Rule 7.02.1 of the Agency's Provisional Staff Regulations and Staff Rules he went back to China on home leave for a period that was to last from 22 June to 4 September 1989. The Agency paid him salary in advance for the whole period and gave him a ticket for travel by air from Vienna to Beijing and back.

He told the Director of the Division of Personnel in a letter of 2 September that he was unable to leave China for want of a certificate that he "didn't take part" in the events in Beijing in the spring of 1989. He did not return to duty at the end of home leave.

A telex of 11 September 1989 from the Director of Personnel asked him why not but went unanswered. In a letter of 31 October to the Director he pointed out that he had already accounted for his absence in his letter of 2 September and said he hoped his appointment would be kept open until he returned.

On 1 November the Director of Personnel wrote on the Director General's behalf to the Permanent Representative of the People's Republic to the Agency to ask where the complainant was and why he had not reported for duty. He got no reply. On 15 November the Director sent the complainant a letter through his counsel in Beijing asking once again why he had not come back from home leave and whether he would be able to report for duty and pointing out that if he intended to resign he would have to return to Vienna to do so. The complainant answered in a letter of 6 December that he had no intention of resigning but was still unable to return because he had not yet got the certificate. He repeated the gist of that letter in another of 8 January 1990.

On 18 January 1990 the Director General wrote to the Chinese Governor and Vice-Minister on the Agency's Board of Governors to seek his help in finding out why the complainant was apparently unable to return. He cited resolutions by the General Assembly of the United Nations on international civil servants' privileges and immunities and said that if the complainant was not allowed back the case would have to be put to the Secretary-General of the United Nations.

The Representative of China wrote on the same day to inform the Director of Personnel that the complainant had started divorce proceedings and stood accused of behaviour against "law and morals", that the court had not yet sat and that he would not be allowed to leave the country before his case came up.

By a letter of 16 March the Chinese Governor told the Director General that the reason why the complainant had not come back was that the divorce proceedings were not yet over; his case was an entirely civil one and had nothing to do with politics.

In a letter of 2 April the Director of Personnel informed the complainant of the administrative procedures available to him. He answered on 3 May 1990 that he had indeed filed a suit for divorce on 27 July 1989 but that Chinese law did not require him to attend the proceedings. He also produced a certificate from his counsel stating that his case had been withdrawn on 20 February 1990.

In a letter of 11 July the Director of Personnel informed him that in line with a decision that the Administrative Committee on Co-ordination (ACC) of the United Nations common system had taken in 1983 the Director General was offering him a one-year extension - up to 26 February 1992 - of his fixed-term appointment, which was to expire on 26 February 1991. He enclosed a copy of the contract for signature, asking him to return it to the Agency. Having got no reply, the Director of Personnel sent him another letter on 9 November and a copy of it to his counsel. The complainant answered on 29 November that he had received both letters and on 23 July had returned the copies of his contract duly signed.

The Director of Personnel went to China on mission from 15 to 20 May 1991 to find out just what was going on. In a mission report dated 23 May he concluded that the reasons why the complainant was not being allowed to leave the country related to his private life and had nothing to do with his status as an Agency official. The complainant wrote to the Director General on the same day challenging the Director's conclusions.

On 14 June 1991 the Director of Personnel wrote to the complainant to say that his contract which was due to expire on 26 February 1992 would not be renewed and to explain that the decision followed the Agency's long-standing policy of staff rotation whereby the tenure of appointment for Chinese translators ran from three to five years.

In a letter of 8 January 1992 the complainant asked the Director General to withdraw the decision on the grounds that since his case was an exceptional one the policy of staff rotation mentioned by the Director of Personnel should not apply "mechanically"; he claimed another two years at least. In a letter of 21 January he asked the Director General to review the decision on exceptional grounds and explained that the reason why his request was late was that, not having a copy of the Staff Regulations and Rules, he had not known what the Agency's appeal procedure was. On 30 January the Director General replied that even though the complainant had missed the time limit in Staff Regulation 12.01.1(D)(1) and the request for review was therefore time-barred, he had reconsidered the decision; but he was upholding it.

On 5 March the complainant appealed to the Joint Appeals Committee against the Director General's decision not to renew his appointment. A majority of the Committee's members recommended upholding the decision. The Director General endorsed the recommendation and so informed the complainant in a letter of 5 December 1992, the impugned decision.

B. The complainant has two pleas.

The first is that by not renewing his appointment when he was wrongfully prevented from leaving China at the end of authorised home leave the Director General broke the rule against accepting instructions from any authority external to the Agency.

The reasons the Chinese authorities gave to explain their behaviour changed as time went by: to begin with, it was that he had filed a suit for divorce; then, after he had withdrawn it, they made out that his private life disqualified him for working abroad. The purpose of the Director of Personnel's going to Beijing was to see whether or not the reasons the Chinese had given for refusing him an exit visa were legitimate. But his mission report, which was largely inconclusive, failed to establish that they were. So by preventing the complainant from leaving the country for reasons which the Agency itself finds inadequate the Chinese Government disregarded Article VII, paragraph F, and XV of the IAEA's Statute and exerted improper influence on the Director General.

The Director General has means other than ordinary diplomatic channels of protecting the Agency's independence. He may, for example, require that all letters from an official about his status - resignation, application for early retirement, special leave, and so forth - be despatched at his duty station and through his supervisors. Had the Director General done so in this case the complainant would have had to be allowed to return to headquarters to demonstrate his freedom of choice unambiguously.

The evidence shows that the Chinese Government's wishes prevailed in the settlement of his case. So by helping to give effect to a decision by a member State the Director General committed a breach of duty and abuse of authority.

Secondly, the complainant alleges that the policy of staff rotation that the Agency gives as the reason for its decision not to renew his appointment was applied only in his case.

Although the Agency has for years applied that policy, which derives from circular SEC/NOT/8 of 2 March 1960, to Professional staff, it has always exempted two groups: language staff and "safeguards inspectors". What is more, the decision to stop exempting them was not taken until 4 June 1991, by the Joint Committee to consider appointments, promotions and extensions of Professional and G.8 staff, and was revoked two days after his own appointment expired, as is plain from a letter that the Director General sent to the president of the Staff Council on 28 February 1992.

As for the "rule" - which the Agency relied on in the internal proceedings - that on average Chinese translators' appointments run from three to five years, it serves merely as a pretext for the Chinese Government to control the careers of Chinese at the Agency by means of "secondment": the United Nations Administrative Tribunal discussed the consequences in Judgment 482 (in re Qiu, Zhou et Yao).

The complainant asks the Tribunal to quash the decisions of 14 June 1991 and 5 December 1992, send his case back to the IAEA for proper action to give him the protection he is entitled to, including reinstatement in his contractual rights, and order the Agency to pay him 10,000 Swiss francs in moral damages and 5,000 in costs.

C. In its reply the Agency states the basis in law for the impugned decision.

In its submission the decision was taken in furtherance of ACC rules that link the preservation of the staff member's contractual rights to the clarification of his case and to the material privileges and immunities. Because the complainant's status in his own country was unclear the Agency decided in July 1990 to offer him a one-year extension of appointment to allow time to shed light on the matter. Only after the Director of Personnel had gone to China and the Agency was satisfied that his privileges and immunities had not been infringed did it decide not to extend his appointment further.

It submits that the impugned decision squares with its rules on fixed-term contracts. Tenure is governed by the rule that "the Agency shall be guided by the principle that its permanent staff shall be kept to a minimum" as laid down in Article VII(C) of its Statute. And under Regulation 3.03(c) of the Provisional Staff Regulations a fixed-term appointment shall "at no time ... be deemed to carry any expectation of or right to extension, renewal or conversion to another type of appointment".

Taking up the complainant's pleas, the Agency observes that the decision not to review his contract was an administrative one which it lawfully took whatever his own wishes might be. So there is no relevance in his argument that he should have been able to return to headquarters to "demonstrate his freedom of choice unambiguously" and in his reference to the rule that all correspondence about a staff member's contractual status ought to be submitted at the duty station and through the supervisor.

The Agency disagrees that preserving the independence of its staff in accordance with Article VII(F) of its Statute means protecting them even beyond the performance of duty. It made persistent efforts to clarify the complainant's situation and went on paying his salary even though at the time he was not actually serving it and was gainfully employed in China.

Also wrong is the allegation that the Director General gave in to pressure from the Chinese Government, as his correspondence with it shows. The Agency never accepted the Government's replies unchallenged and reported the complainant's case to the Secretary-General of the United Nations.

He is mistaken in asserting that the decision to apply the policy of rotation to language staff affected only himself. It was in keeping with the Agency's practice regarding the tenure of language staff and its review of that practice in June 1991 was unrelated to his case.

Lastly, Judgment 482 of the United Nations Administrative Tribunal is immaterial since it sets new requirements as to the status of seconded officials of the United Nations. The Agency "has no practice of secondment of officials in respect of Member States except for provision of cost-free experts".

It asks the Tribunal to hear the Director of Personnel and to dismiss the complaint.

D. In his rejoinder the complainant challenges the Agency's pleas in support of the impugned decision.

It did fail to act in accordance with the ACC rules it cites. When he went to China the Director of Personnel did not fulfil his commission - much narrower though it was than what those rules prescribed - to shed light on the case. The Agency passes off gratuitous allegations as facts. It never established that the reasons the Chinese Government gave for keeping him in China against his will were legitimate. It is wrong to bring up the issue of his privileges and immunities, which the Government sedulously avoided.

Turning to its assertion that the decision under challenge is consistent with its rules on fixed-term appointments, he cites pleas in his complaint which he believes it has omitted to answer. He never said he was on secondment and referred to Judgment 482 of the United Nations Administrative Tribunal only to illustrate the Chinese Government's treatment of Chinese citizens.

Though the Agency did try to clear up his case its attitude changed in the second quarter of 1991. He denies that it went on paying his salary while he was doing no Agency work and that he was at the same time gainfully employed in China.

E. In its surrejoinder the Agency submits that the complainant's rejoinder raises no new issue.

It avers that it did fully satisfy the requirements of the relevant ACC decisions but that they cannot, as the complainant wrongly assumes, be construed as requiring investigation into the merits of a civil law case in any particular country. Neither Agency nor Tribunal is competent to interpret Chinese law or to determine whether a law of a member State has been broken.

It again rejects the complainant's allegation of a change in policy on fixed-term appointments in June 1991. It was just a coincidence that the Joint Committee to consider appointments, promotions and extensions of Professional and G.8 staff met ten days before the letter notifying the non-renewal of his appointment was sent. He is wrong to infer from the Director General's letter to the president of the Staff Association that the Agency reversed its decision after his contract expired.

CONSIDERATIONS:

1. The complainant, a citizen of China, joined the staff of the Agency as a translator on 27 February 1988. His fixed-term appointment was to end on 26 February 1991. In this complaint he is objecting to the Agency's refusing to extend his appointment after 26 February 1992.

2. The material facts are that he went on home leave to China in June 1989 but when the leave expired on 4 September 1989 failed to turn up in Vienna. In a letter he wrote on 2 September to the Director of the Division of Personnel he explained that he was unable to leave China because he had failed to obtain from the Government a "special card" proving that he "didn't take part in the latest counter-revolutionary rebellion". He protested that he had never broken Chinese laws or regulations. There ensued some correspondence and the Agency took informal and then official steps to find out from the Chinese Permanent Mission in Vienna just why he was not being allowed to come back. The Permanent Representative of China informed the Agency by a letter of 18 January 1990 that the complainant had filed a suit against his wife for divorce and she was defending it on the grounds that his behaviour had offended "against law and morals". The divorce court was - said the Representative - "investigating this case" but had not yet sat, and that was why he "could not return to his duty in time".

3. The Government's stand was borne out in a letter of 16 March 1990 from the Chinese Governor on the Agency's Board of Governors, who explained that the suit for divorce was "entirely a civil case" and had "nothing whatsoever to do with politics".

4. The answer seems not to have satisfied the Agency. At all events on 11 July 1990 it told the complainant, who had by then dropped the divorce suit, that his appointment was extended to 26 February 1992. As the Agency says in its reply, "it was expected that in the meantime the matter could be clarified and positively resolved and that the complainant would be able to resume his duties, thereby enabling him to complete his contractual period with the Agency".

5. That proved a fond hope. The complainant being still refused an exit visa, the Agency decided to send the Director of Personnel in May 1991 to see him and try to sort things out. The salient findings by the Director in his detailed mission report were the following. The complainant was, he said, being held in China against his will but had a job at the Chinese Nuclear Information Centre and was performing it freely. The reasons for not letting him go back to Vienna were seemingly not his political opinions but his private life and by the Agency's lights must be considered insufficient. Yet the decision not to let him leave had - or so it appeared - been taken in accordance with Chinese administrative law, though the Director did not feel competent to judge whether or not that law offended against human rights.

6. It was on the strength of the Director's report that on 14 June 1991 the Agency decided against extending the complainant's appointment beyond 26 February 1992. To be sure, the Director did say in the letter of 14 June 1991 notifying the decision to him that the Agency had told the Chinese Government that the charges against him did not seem, particularly in the absence of court proceedings, to "constitute sufficient grounds for preventing" him from leaving the country. But the Director went on to observe that the privileges and immunities of Agency staff were not at stake since the Government's decision related not to his work for the Agency but to his "personal conduct"; anyway the Agency's "long-standing practice" was to apply "a rotation policy" to its Professional category of staff; in line with that practice the tenure of appointment for Chinese translators had varied from three to five years; and since the complainant would have completed four years' service with the Agency by the end of his current contract it would not be renewed.

7. That is the decision he asked the Director General to review. The Director General having refused by a confirmatory decision of 30 January 1992, he went to the Joint Appeals Committee. The Committee recommended by a majority upholding the earlier decision, and the Director General did so by a letter of 5 December 1992, the decision impugned.

8. Receivability is no longer at issue. Before the Committee the Agency argued that the complainant was out of time in challenging the original decision of 14 June 1991, but the Committee decided that the special circumstances of the case warranted relieving him of the time bar, and the Agency does not demur.

9. The complainant's pleas may be readily inferred from the foregoing narrative. The first is that the Agency acted in breach of the rule against its taking instructions from a government by yielding to growing pressure from the Chinese not to extend his appointment. Secondly, he contends that the grounds stated by the Agency for its decision are mistaken both in fact and in law. In his submission the alleged "long-standing practice" of rotation of Professional staff never applied to translators; that policy was broadened to cover translators only a few days before being applied to him and ceased to cover them only a few days after the end of his appointment; and besides, it was applied only to translators of certain nationalities, and they included the Chinese because of instructions the Chinese Government had given in breach of the material provisions of the Staff Regulations.

10. The Agency's reply is that it fully observed the rules laid down by the Administrative Committee on Co-ordination about safeguarding the contractual rights of staff in the event of breach of their privileges and immunities. It did its utmost to shed light on the case and protect its employee properly. It paid his salary. It made sure that his privileges and immunities were not at stake. And although in the end it refused to extend his contract the reason was perfectly sound and it committed no breach of the rule against acting on government instructions.

11. The Tribunal can rule on the case without holding the hearings for which each of the parties has applied.

12. As the Tribunal has consistently held, a decision to renew or not to renew a fixed-term contract is at the discretion of the international organisation, but the exercise of its discretion is subject to review, for example where the decision rests on a mistake of fact or of law: see Judgment 1317 (in re Amira) also delivered this day. In this instance

the Agency took the impugned decision in the belief that it had done its utmost to shed light on a case in which the official's privileges and immunities were not in the last analysis at stake, and it therefore felt able to apply its usual rules on the rotation of staff.

13. There is no denying the difficulty that international organisations face in sorting out such cases. The Agency made laudable attempts to get a change of mind in the Chinese Government. There is merit, too, in its contention that it "had to address the competing interests of providing protection to its staff member on the one hand, and of being able to perform its functions, on the other".

14. Yet it is plain on the evidence that the complainant was barred from returning to perform his duties in Vienna for reasons that the Agency rightly considered to be immaterial. That is clear, for example, from the above-quoted letter of 14 June 1991 from the Director of Personnel. The complainant's starting proceedings for divorce - which he later dropped anyway - obviously affords no proper grounds for breach of his rights as an international official. Circumstances relating to an official's private life - even though they may prompt civil or penal proceedings - are relevant in the area of administration only insofar as they may affect his performance of official duties. But in that event only the organisation that employs him would be competent to determine the issue. The Agency had and still has the duty to safeguard its employee's right to work in full independence for his employer.

15. Its duty to safeguard the complainant's rights in that way was the more compelling because the reasons which it held to warrant non-renewal are highly dubious. The alleged policy of rotating Professional staff was not, as it makes out, "long-standing" in its application to translators and indeed, as is plain from the letter of 28 February 1992 signed by the Director General, anything but consistent. Besides, even supposing that translators get tenure for only three to five years, it is hard to see why the Agency could not extend the complainant's appointment beyond a total of four. There was, after all, nothing in his performance that it could plead in support of so limiting his total tenure.

16. The conclusion is that neither the Director General's decision of 5 December 1992 nor the one of 14 June 1991 that it confirmed can stand, and the complainant must succeed in his application for referral of his case to the Agency so that it may reinstate him in his contractual rights pending clarification of his position. Since this judgment gives him full satisfaction there are no grounds for allowing his claim to damages for moral injury. But he is entitled to costs and is awarded 5,000 Swiss francs, the sum he claims under that head.

DECISION:

For the above reasons,

1. The Director General's decisions of 14 June 1991 and 5 December 1992 are set aside.
2. The complainant is referred to the Agency for reinstatement in his contractual rights pending clarification of his position.
3. The Agency shall pay him 5,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

SEVENTY-SIXTH SESSION

In re SHARMA (No. 4)
(Application for execution)

Judgment 1313

THE ADMINISTRATIVE TRIBUNAL

Considering the application for execution of Judgment 1238 filed by Mr. Hari Chand Sharma on 28 June 1993, the reply of 31 August from the World Health Organization (WHO), the complainant's rejoinder of 24 September and the Organization's surrejoinder of 25 October 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. By Judgment 1238 of 10 February 1993, in which it allowed Mr. Sharma's third complaint, the Tribunal quashed two decisions by the Director-General of the WHO, one of 21 July 1987 ordering the complainant's dismissal as from 22 July 1987 and the other of 20 February 1992 informing him that reinstatement in his former position was not in the Organization's interest and that there was no suitable "position of less responsibility". The Tribunal further ruled, in 5:

> "As to the future [the WHO] must do its utmost to reinstate him in the post which he held on 21 July 1987 or in any comparable one acceptable to him. Only if that proved impossible should it pay him additional damages equivalent to the salary, allowances and other entitlements which he would have received over a period of two years had he been reinstated in its employ as from the date of this judgment."

The Tribunal accordingly ordered in points 3 and 4 of its decision:

> "3. [The Organization] shall reinstate him as from the date of this judgment.
>
> 4. If it cannot do so it shall pay him additional damages equivalent to the salary, allowances and

> other entitlements which he would have received over a period of two years had he been reinstated as from the date of this judgment."

2. In his fourth complaint the complainant is impugning a decision which the Director-General of the WHO notified to him in a letter of 20 May 1993 about the execution of Judgment 1238. The Director-General said in that letter that "with regard to point 3 [of Judgment 1238], I am not in a position to reinstate you; you will, therefore, be paid additional damages provided under 4".

3. The complainant submits that the Director-General has failed to carry out faithfully the Tribunal's decision: he "has not given any indication about his utmost efforts to find a post (ND.4 level which the complainant held at the time of his separation from service in 1987 or ND.5 post to which level his previous assignment has since been elevated)"; nor has the Director-General "given any reasons or justification why it had proved impossible for him to fix up a lowly ND.4/ND.5 employee in his vast organisation". The complainant asks the Tribunal to order that his reinstatement "be made absolute and unconditional effective from the date" of Judgment 1238. He also seeks such damages as the Tribunal deems fit for "vexatious harassment" and an award of costs.

4. In its reply the WHO points out that at the end of his letter of 20 May 1993 the Director-General explained that the delay in executing the judgment had been due to the "review of reinstatement possibilities". The Organization gives an account of that review and concludes that it did all that the judgment required of it. "The matter of reinstatement was", it says, "considered at the highest level and the grounds for taking a negative decision were founded on material and relevant facts". It argues that in any event the complainant's acceptance of the payment of damages, albeit with a reservation, estops him from pursuing his claim to reinstatement.

5. The Tribunal will take up first the plea of estoppel. It is true that in a letter the complainant wrote to the Director-General on 15 June 1993 he acknowledged receipt of a cheque from the Organization for 844,549 Indian rupees "in settlement" of his entitlements under Judgment 1238. But he went on:

> "I am accepting this payment without prejudice to my rights that may arise out of the aforesaid judgment".

The Organization cannot therefore reasonably contend that he misled it. His express reservation made it plain that he was not surrendering his right to appeal to the Tribunal nor acquiescing in the WHO's manner of executing its judgment. Indeed he filed the present application for execution only a few days later. In Judgment 26 (in re Waghorn) the Tribunal held, in the last-but-one paragraph of A:

> "... the complainant, by accepting on several occasions and without reservation the payments made to him by the Organisation, in sizable and generous amounts, may be considered under general principles of law as having acquiesced in the actual offers which were made to him and as having relinquished the remainder of his claims."

In other words, it is only unqualified acquiescence in the offer that will be read as relinquishment of claims and as bringing the doctrine of estoppel into play. The conclusion is that the plea of estoppel fails.

6. Judgment 1238 put the Organization under the obligation to reinstate the complainant as from the date thereof, 10 February 1993, and to discharge that obligation it was required to "do its utmost" to find him a suitable position. Only if it had done so, and to no avail, was it free to pay him damages instead. So the main issue is whether by the time the Director-General sent his letter of 20 May 1993 the Organization had done its utmost to reinstate the complainant. The Tribunal has had occasion to rule on the execution of a similarly worded order in another case. In Judgment 1242 (in re Bluske No. 2) it affirmed that "the Director-General had the duty to justify his decision by explaining why it was impossible to reinstate the complainant". The Director-General of the WHO had the same duty in this case, and it is evident that his letter of 20 May 1993 plainly failed to discharge it. The letter merely tells the complainant of a "review of reinstatement possibilities"; it does not say why reinstating him proved impossible. It is mere notification, not an explanation, of the decision. Indeed only in its reply to the complaint does the Organization give some account of the difficulties it says it faced in seeking to reinstate him. Its decision not to reinstate him therefore cannot stand.

7. Furthermore, in a letter of 26 March 1993 to the Director-General the complainant observed that the WHO's Regional Office for South East Asia (SEARO), where he had been employed before, had "advertised one vacancy against post No. SEAR/93/7", which was for a clerk at ND.4, the grade he held when he left. He got no reply to that letter, and the Organization apparently does not deny what he said in it. He further alleges in his rejoinder that on 18 May 1993, two days before the Director-General wrote his letter, SEARO's news bulletin announced that that vacancy was cancelled, only to announce, on 3 August 1993, that it had been revived as post

No. 93/22. Again the Organization offers no rebuttal of those allegations in its surrejoinder.

8. In the circumstances the complainant's case must be sent back to the Organization for a new decision to be taken in proper execution of Judgment 1238. The Tribunal reaffirms that for that purpose it must "do its utmost to reinstate him in the post which he held on 21 July 1987 or in any comparable one acceptable to him".

9. He is in any event entitled to a further award of damages for its failure to execute Judgment 1238, and the Tribunal sets the amount at the equivalent of one year's salary, allowances and other entitlements. It also awards him 200 United States dollars in costs.

DECISION:

For the above reasons,

1. The Director-General's decision of 20 May 1993 is set aside insofar as it refuses to reinstate the complainant as from 10 February 1993, the date of Judgment 1238.
2. The case is sent back to the Organization for a new decision on the reinstatement of the complainant as from that date.
3. The Organization shall pay the complainant the equivalent of one further year's salary, allowances and other entitlements in damages for all forms of injury he has sustained because of its failure to execute Judgment 1238.
4. It shall pay him 200 United States dollars in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

William Douglas

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re FAYMANN — Judgment 1314

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Anton Faymann against the International Labour Organisation (ILO) on 18 November 1992, the ILO's reply of 1 March 1993, the complainant's rejoinder of 8 April and the Organisation's surrejoinder of 15 July 1993;

Considering Article II, paragraph 1, of the Statute of the Tribunal and Articles 4.2 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Austrian citizen who was born in 1933, joined the ILO in 1979 as a chief technical adviser at grade P.5 under technical co-operation programmes in Latin America and the Caribbean. In 1981 he became regional adviser for Latin America and the Caribbean, also at grade P.5. Having won a competition for a P.4 post in the Hotel and Tourism Branch (HOTOUR) as a specialist in the hotel industry, catering and tourism, he was transferred in 1982 to the Organisation's headquarters in Geneva.

The ILO's programme and budget for 1992-93 provided for establishing a post in HOTOUR to grant advisory services that had till then been paid for out of funds for technical co-operation. In a minute of 5 April 1991 to the chief of the Personnel Development Branch (P/DEV) the complainant said that he hoped to see the post put up for competition and to be considered for it. The chief of P/DEV told him in a minute of 7 January 1992 that the Director-General had ordered review of the transfer of such posts from the programme for technical co-operation to the Organisation's regular budget and that the post was not yet to be filled. In February 1992 the Organisation issued a list of the "staff movements" that had taken place in January. It thereby announced the transfer of an inter-regional adviser, Mr. Serge Delpech, to HOTOUR at grade P.5.

On 6 May 1992 the complainant submitted a "complaint" under Article 13.2 of the Staff Regulations objecting to "the appointment of another official to the P.5 position by direct selection". He alleged discrimination and treatment inconsistent with the Regulations. In a letter of 13 October 1992 the Director of the Personnel Department informed him on the Director-General's behalf that since the Organisation had not yet filled the vacancy his allegations were unfounded. That is the decision he impugns.

After the filing of his complaint the ILO issued a staff list in February 1993 in which it showed Mr. Delpech as the holder of a P.5 post in the complainant's branch. By an undated corrigendum it removed Mr. Delpech's name. By a minute of 2 March 1993 the chief of the Personnel Planning and Career Development Branch informed the complainant that the Director-General had awarded him personal promotion to P.5 as from 1 October 1991.

B. The complainant submits that the decision to transfer Mr. Delpech to the new post was in breach of the Staff Regulations and tainted with bias and misuse of authority. He relies on the provisions in Article 4.2(e) listing the sort of vacancies that "direct selection by the Director-General" shall be the "normal method" of filling. They include posts "in technical co-operation projects" and those "of a purely temporary nature, up to two years, of a specialist nature, not expected to lead to a career in the ILO". Under 4.2(f) the Director-General decides "after consulting the Selection Board" how to fill any other vacancy below grade D.1, the ordinary method being competition.

Had Mr. Delpech been kept on a post in technical co-operation direct selection would have been proper. But the Director-General was wrong to put him on a P.5 vacancy funded from the regular budget without having consulted the Selection Board and held a competition. The announcement in February 1992 of Mr. Delpech's transfer shows that there was budgetary provision for the new post and that Mr. Delpech had not merely had his contract under the technical co-operation programme extended. There was no reason to assume that the new post would prove temporary; even if the Director-General had plans that might affect the branch's future the holding of a competition would not have tied his hands since the successful candidate might have kept the same type of contract with only a change in grade.

The complainant also charges the chief of his branch with "manoeuvring" to give Mr. Delpech the new post. As the complainant had served under the technical co-operation programme at a higher grade than the one he held at headquarters after winning a competition it was plain that the Director-General had given Mr. Delpech an "unjustified advantage".

The complainant seeks (1) the quashing of the decision to transfer Mr. Delpech as "announced in the list of staff movements in January 1992"; (2) the award of suitable damages for injury to his career in the loss or at least the delay of the opportunity (a) to assume the responsibilities of a P.5 official and (b) to obtain a higher salary and pension; (3) as an alternative to (1) and (2), the award of suitable damages for "injury to career prospects and loss of opportunity to obtain improved salary and pension entitlements"; and (4) 5,000 Swiss francs in costs.

C. In its reply the ILO submits that the complaint is misconceived since it has taken no decision to transfer Mr. Delpech. It merely extended his contract pending the filling of the new post so that he could carry out duties much like those he had already been performing. Although his name appeared by mistake in the list of staff movements in January 1992, the list had no force in law. Paying him out of funds allotted for a vacant post did not amount to filling it. Whether a vacancy is temporary or not is a matter for the Director-General, not the complainant, to decide. Besides, the decision to postpone filling the post was discretionary. Had Mr. Delpech and not the complainant won the post by competition the ILO would have had to change the type of contract he held, and that might have put a burden on the Organisation.

The complainant offers no evidence to bear out his allegations of discrimination and misuse of authority. Far from mistreating him, his supervisor made favourable appraisals of his work and recommended the merit increment he got in 1990. The Director-General's decision to delay filling the post was taken in the context of a general policy - not limited to the vacancy in the complainant's branch - that was intended to safeguard the Organisation's interests at a time when changes in its programme and budget were looming.

In any event the complainant's claim to damages must fail because he would have had no certainty of winning a competition if the Administration had not postponed it.

D. In his rejoinder the complainant acknowledges that the decision of 2 March 1993 to grant him personal promotion to P.5 as from 1 October 1991 satisfies his claim to damages for material loss. But it leaves his claim to damages for moral injury since his status, duties and "career satisfaction" are lower than they might have been if he had won the competition.

Developing his earlier pleas, he cites further evidence of Mr. Delpech's transfer in the staff list issued in February 1993 and describes the "gradual process" by which his chief strengthened Mr. Delpech's position in HOTOUR.

He presses claims (1) and (4) and narrows claim (2) to damages for loss or delay of the opportunity to assume P.5 responsibilities and (3) to damages for injury to career prospects.

E. In its surrejoinder the ILO contends that, the complainant having had personal promotion, there is no evidence of the injury he alleges. For him to qualify for personal promotion his services had to be at a higher level than his post ordinarily required. The Governing Body of the International Labour Office having recently approved the Director-General's programme and budget proposals, a competition is soon to open for the post.

CONSIDERATIONS:

1. The complainant joined the ILO in 1979 and was by 1991 serving as an "industrial specialist (hotel, catering and tourism)" in the Hotel and Tourism Branch (HOTOUR) of the Sectoral Activities Department of the International Labour Office. That was a grade P.4 post funded out of the Organisation's regular budget. Having learnt that the posts of some industrial specialists in the Department had been regraded P.5, he applied in February 1991 for review of the grading of his own post. His request was refused.

2. Another ILO employee, Mr. Serge Delpech, was in 1991 serving as a technical co-operation expert; he held a P.5 post as "inter-regional adviser (hotel, catering and tourism)" under a fixed-term appointment that was to expire on 31 December 1991; and that post was being financed out of what are known as the ILO's Regular Budget Technical Co-operation (RBTC) funds.

3. The Organisation decided to make the inter-regional adviser's P.5 post as from January 1992 a regular budget one in HOTOUR. In a minute of 5 April 1991 to the chief of the Personnel Development Branch the complainant wrote:

> "I hope the post will not be filled by a direct selection, but that all professionals attached to this Branch [HOTOUR] whose careers are blocked are equally given a

> chance to be considered for this position through a competition."

He expressed his own interest in the post.

4. In September 1991 the ILO decided to fill the post by holding an internal competition open to technical co-operation experts. But in the event that is not how it filled the post. It explains that before a notice of vacancy went out the Director-General decided for reasons of policy to review, among others, all positions financed out of RBTC funds; by mid-December 1991 it became clear that there would be a reduction in HOTOUR's activities in 1994-95; so it was decided to postpone filling the vacancy until the review had been completed and, to prevent disruption of the programme, to extend Mr. Delpech's contract by one year to enable him to perform temporarily much the same duties as before. The Organisation further submits that because the post was specialised and was not certain to survive in the long term it would have been entitled to fill the vacancy under Regulation 4.2(e) by transfer of Mr. Delpech but in fact it did not act under that provision. The upshot was that by a minute of 7 January 1992 the chief of the Personnel Development Branch informed the complainant that the position would "not be filled at this stage".

5. The complainant alleges that the Organisation did fill the vacancy without holding an internal competition. He relies on the list which the Organisation issued in February 1992 of the staff movements that had taken place in January 1992 and which announced the transfer of Mr. Delpech from RBTC to HOTOUR as from 1 January 1992 at grade P.5; that, he says, could mean only that Mr. Delpech had been appointed to the new P.5 post for inter-regional adviser in HOTOUR.

6. In the "complaint" which he submitted on 6 May 1992 in accordance with Article 13.2 of the ILO Staff Regulations the complainant cited the list of staff movements in January 1992. In a minute of 13 October 1992 in reply the Director of the Personnel Department, while stating that, for the same reasons as those set out in 4 above, the vacancy in HOTOUR had not yet been filled, did not say that there was any error in the list of staff movements.

7. In his present complaint the complainant claims:

> "annulment of the decision to fill the grade P.5 vacancy in the Hotel and Tourism Branch by the transfer from the Technical Co-operation Programme of Mr. Delpech, announced in the list of staff movements in January 1992."

In its reply the Organisation admits that the list wrongly described the movement of Mr. Delpech as transfer, but pleads:

> "this list has no legal status, being a document intended purely for information and showing simply a record of staff movement. It does not and cannot create legal obligations."

8. The ILO has unequivocally stated, and it is plain on the evidence, that the Organisation took no decision to fill the P.5 post for an inter-regional adviser in HOTOUR by the transfer of Mr. Delpech or otherwise. So the complainant has suffered no injury. His principal claim must therefore fail, there being no decision for the Tribunal to quash. Yet he had to come to the Tribunal because the ILO left the matter uncertain: the list of staff movements led him to believe that the post had been filled by the transfer of Mr. Delpech; and the Organisation failed to make it clear in its reply to his Article 13.2 "complaint" that in that respect the list was wrong. The uncertainty continued even up to May 1993, when the Organisation found it necessary to write to Mr. Delpech to correct any similar misunderstanding he might have had about his own status. The Tribunal accordingly grants the complainant an award towards costs and sets the amount at 2,000 Swiss francs.

9. As to his claims to damages, the complainant acknowledges that the personal promotion to P.5 he was granted pendente lite as from 1 October 1991 has fully satisfied his claim to an award of material damages. In any event those claims cannot succeed, being consequential upon the quashing of a decision that was never taken.

DECISION:

For the above reasons,

1. The ILO shall pay the complainant 2,000 Swiss francs in costs.
2. His other claims are dismissed in their entirety.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas
William Douglas

Mark Fernando

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

AB Gardner
A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re MENAPACE Judgment 1315

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mr. Richard Menapace against the European Patent Organisation (EPO) on 8 January 1993 and corrected on 26 January, the EPO's reply of 8 April, the complainant's rejoinder of 17 May and the Organisation's surrejoinder of 24 June 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 5, 7, 34(1) and 37 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Annex II to those Regulations;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Articles 5 and 7 of the EPO Service Regulations read:

> "5(1) Recruitment shall be directed to securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Contracting States.
>
> ...
>
> (3) No particular post shall be reserved for nationals of any specific Contracting State.
>
> 7(1) Recruitment shall generally be by way of competition in accordance with the procedure laid down in Annex II. ...
>
> A procedure other than that of competition may be adopted by the appointing authority for the recruitment of ... senior employees ... and also, in exceptional cases, for recruitment to posts which require special qualifications.

> (2) For each competition, a selection board, the composition of which is laid down in Annex II, shall be appointed by the appointing authority. This board shall draw up a list of suitable candidates.
>
> The appointing authority shall decide which of these candidates to appoint to the vacant post."

Article 1 of Annex II on Competitions says that "the Selection Board for each competition shall normally comprise a chairman, one or more members appointed by the appointing authority and one member appointed by the Staff Committee".

The complainant, an Austrian citizen, has been on the staff of the EPO in Munich since 1985 and is a permanent employee at grade A3. He served as chairman of the local Staff Committee in Munich in 1991-92.

On 11 April 1991 the President of the European Patent Office and the Central Staff Committee - which represents EPO staff at every level and duty station and is also in Munich - met to discuss new guidelines for protecting personal data in the Office. The President sought the agreement of the staff representatives to appointing Mr. Ludwig Kirst, a lawyer then employed in the German Ministry of Justice in Bonn, to a new post as data protection officer. In a letter to the President dated 15 April and signed on his behalf by the complainant, the chairman of the Central Staff Committee commented on the text of the guidelines and said that the Committee did not consent to the appointment of Mr. Kirst, "an outside candidate about whom little is known".

In mid-May 1991 the EPO invited Mr. Kirst to Munich for interview but withdrew the invitation because of the staff representatives' view that it was in breach of the selection procedure set out in the Service Regulations.

By a standard letter of 17 May the Personnel Recruitment and Administration Department asked the complainant, who had just taken over as chairman of the local Staff Committee in Munich, to approve a draft announcement of a competition to fill a vacancy for a lawyer in the Legal Services Directorate (D 5.1.3) and to name the Committee's representative on a selection board. As chairman the complainant answered in a letter of 24 May that the Committee did not approve the text, for reasons that he set out in an appendix, and that he himself would be "the staff representative with responsibility for the competition".

On 22 May, however, the EPO had issued two notices of vacancy, one inviting applications from inside candidates, the other inviting outside applications, by 7 June. The title of the post was "Lawyer in Directorate 5.1.3" and the grade A2/3.

On 14 June 1991 the Administration drew up a list of candidates comprising two inside and eight outside ones, and it included Mr. Kirst. On 28 June an "interview panel" consisting of the Director of D 5.1.3, a personnel officer and the complainant saw Mr. Kirst but no-one else. The two members other than the complainant reported on 1 July to the President of the Office that Mr. Kirst might do provided he underwent training; but the complainant submitted a text dated 3 July stating doubts about Mr. Kirst's fitness and several objections to the procedure.

The President having decided that the post should go to Mr. Kirst, an offer was made to him, he accepted it, and he took up duty on 19 August 1991.

On 23 August the complainant filed an internal appeal asking the President to revoke the appointment and order a new procedure for recruitment to the post in D 5.1.3. As chairman of the local Staff Committee in Munich he sent the President an open letter on 26 August stating the staff representatives' strong objections to the procedure and to the "gross infringement of the rules on recruitment".

On 21 January 1992 the EPO issued a notice inviting applications for the post of data protection officer by 5 February. A special edition of the EPO "Gazette" was published on 29 June 1992 about the protection of personal data, and in it the President announced that "following an internal selection procedure and after hearing the Central Staff Committee" he had appointed Mr. Kirst to the post.

In its report of 31 August 1992 the Appeals Committee was unanimous that the procedure for recruitment to the post of lawyer in D 5.1.3 had not been in line with the Service Regulations and indeed showed serious errors and that the "sole purpose of the procedure" had been to put Mr. Kirst on the post "with a view to his appointment as the EPO's first Data Protection Officer". By a majority of three to two the Committee recommended allowing the complainant's appeal, revoking the appointment of Mr. Kirst and going through a new procedure for recruitment to the post of lawyer in D 5.1.3. But by a letter of 12 October 1992 a personnel officer signing on behalf of the Director of Staff Policy informed the complainant that the President rejected that recommendation. That is the decision impugned.

B. The complainant contends that the President's decision to appoint Mr. Kirst to the post as "lawyer" was unlawful on two grounds.

For one thing, there ought to have been proper participation by a staff representative in the process of selection. The President simply gave instructions to recruit Mr. Kirst: a vacancy was created just for him, he alone was interviewed, and the decision to appoint him was premature. In short, the whole exercise prevented the complainant from exercising his rights as a member of the Board.

Secondly, the notice of vacancy issued on 22 May 1991 did not set out the actual duties of the post. It was therefore not directed, as Article 5(1) of the Service Regulations requires, "to securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis ...".

As the Tribunal held in Judgment 1147 (in re Raths), a member of the Staff Committee of the EPO may rely on his position as such to ensure observance of the Service Regulations. Since the EPO prevented the complainant from doing so, the decision he is impugning was in breach of his rights and he therefore has a cause of action. He accordingly asks the Tribunal to set aside the appointment of Mr. Kirst as a permanent employee of the EPO. He also seeks 2,000 German marks in costs.

C. In its reply the EPO discusses the purport of Judgment 1147. It submits that the intent of that judgment is not to confer on members of selection boards and such bodies a right to file suit in the general interest or a power to enforce observance of the Service Regulations. In its view the complainant may not just plead some flaw in the process of selection but must show that the procedure was such as to prevent him from exercising the rights and performing the duties inherent in his position as a member of the Selection Board and that he sustained injury on that account. The complainant suffered no such injury in this case.

It is clear from the evidence - and in particular from the letter of 15 April 1991 which the complainant signed on behalf of the chairman of the Central Staff Committee - that by mid-April 1991 he knew just what duties the holder of the post in D 5.1.3 would be expected to discharge and that the President had someone in mind to take up the post and then to become data protection officer. So the notices of vacancy could not have misled him.

In mid-May 1991, when he had the opportunity of interviewing Mr. Kirst, he refused to do so. What is more, though he must have known by 28 June 1991 that the Administration had, in accordance with Article 4 of Annex II to the Service

Regulations, drawn up a list comprising two internal candidates and eight external candidates he does not seem to have called for any of the others to be interviewed. Nor did he seek to ensure that the Board drew up the shortlist of qualified applicants that was required under Article 5(1) of Annex II.

Even supposing there was any evidence of the President's giving instructions to recruit Mr. Kirst such instructions would not have kept the complainant from discharging his duties as a member of the Board. In fact he took an active part in the recruitment procedure and began his remarks of 3 July by saying that he "concurs with the report on Mr. Kirst's interview": if he had been prevented from exercising his rights would he not have dissociated himself from the proceedings?

In any event the quashing of Mr. Kirst's appointment would not be a suitable remedy: Mr. Kirst should not be called to account for alleged procedural flaws. Besides, he no longer holds the disputed post, so quashing his appointment would have no practical effects.

D. In his rejoinder the complainant denies refusing to interview Mr. Kirst: the interview was cancelled after staff representatives told the Administration that they saw no lawful basis for one since there was no vacancy. What he alleged was that the notice of vacancy was misleading, not for him, but for any candidates other than Mr. Kirst who imagined they stood a chance of being appointed. He did not receive the Administration's list of candidates until the interview on 28 June 1991 and never saw their files. The EPO's interpretation of his comments on the Board's report does not square with the intended meaning in context.

What matters is whether the quashing of the appointment would be the lawful consequence of a flawed process of recruitment. Since the case law says that it would, Mr. Kirst's present duties are immaterial. To ensure that the effects of quashing are plain to the Organisation the complainant also asks the Tribunal to declare that Mr. Kirst's appointment announced in the EPO "Gazette" on 29 June 1992 as data protection officer "did not give him the status of a permanent employee of the EPO".

E. In its surrejoinder the Organisation states that the rejoinder contains nothing new that matters. That the notice of vacancy may have been misleading to potential candidates does not afford the complainant a cause of action. It is because the complainant was not a candidate for the material post that quashing is, in the EPO's submission, inappropriate.

Insofar as the claim about Mr. Kirst's appointment as data protection officer did not form part of the internal appeal it is plainly irreceivable.

CONSIDERATIONS:

1. The complainant, acting on behalf of the EPO's local Staff Committee in Munich, is asking the Tribunal to set aside the appointment of Mr. Ludwig Kirst as a permanent employee of the Organisation on a post as "lawyer" in Directorate 5.1.3.

2. On 11 April 1991 the President of the Office sought the consent of the Central Staff Committee to appointing Mr. Kirst to fill a new post for a data protection officer. In a letter of 15 April to the President the Committee gave its reasons for not agreeing.

3. On 17 May 1991 the Personnel Recruitment and Administration Department wrote to the complainant as chairman of the local Staff Committee in Munich asking him to agree to the text of a notice of vacancy for a lawyer in Directorate 5.1.3 and to nominate a staff representative on the Selection Board. In a letter of 24 May the complainant answered that the Committee did not agree with the text of the notice and he gave his own name as the staff representative.

4. On 22 May notices of vacancy had been posted inviting internal and external applications by 7 June 1991. There were two inside and eight outside candidates. On 28 June Mr. Kirst, who was one of the outside candidates, was interviewed by the Director of D 5.1.3, an official of the Personnel Department and the complainant. On 16 July the EPO offered Mr. Kirst the post and he took up duty on 19 August.

5. The complainant lodged an appeal objecting to the recruitment procedure the Office had followed. In a well-reasoned opinion of 31 August 1992 the Appeals Committee unanimously concluded that the procedure showed serious errors and that the sole purpose had been to appoint someone chosen in advance. By a majority of three to two the Committee recommended allowing the appeal, setting aside the appointment of Mr. Kirst and ordering a new recruitment procedure. But the President's decision of 12 October 1992 states:

> "... the appeal is dismissed as unfounded. The Office concedes that there may possibly be grounds for doubting the formal correctness of the recruitment procedure. However, although the appeals procedure has brought certain formal deficiencies to light, the appointment of the candidate as a permanent employee has already entered

> into force, giving him a legal title to the post. The Office is therefore unable to accept the Appeals Committee's recommendation that a new competition be held."

That is the decision now impugned.

6. According to Article 34(1) of the Service Regulations the Staff Committee shall "represent the interests of the staff", "maintain suitable contacts" between the Administration and the staff and "contribute to the smooth running" of the Office. According to Article 37 the staff must be represented on selection boards. Annex II to the Regulations sets out a detailed procedure for the filling of vacancies by competition. Article 2(2) of that annex requires that in the case of external competitions notices must be published in each of the Contracting States not less than one month before the closing date; Article 4 requires the Administration to draw up a list of the candidates who meet the qualifications for the post and Article 5(1) requires the Selection Board to examine the files and draw up its own list of candidates with the requisite qualifications. Under 5(4), on completion of its proceedings the Selection Board shall "draw up the list of suitable candidates" and forward it to "the appointing authority, together with a reasoned report ... including any comments its members may wish to make".

7. The Organisation's first plea is that the complainant has to prove that the procedure was conducted in such a way as to prevent him from exercising his rights and performing his duties as a member of the Selection Board and that, failing such proof, the complaint is irreceivable. In any event the Organisation denies preventing him from exercising his rights as a member of the Selection Board and says he took an active part in the recruitment proceedings.

8. The plea cannot be sustained. In Judgment 1147 (in re Raths) under 4 the Tribunal held that if the members of the Staff Committee did not have power as such to enforce their rights the system of staff representation set up by the EPO would prove meaningless. Similarly, in Judgment 1269 (in re Errani No. 2) under 13 the Tribunal ruled that since "neither the Service Regulations of the EPO nor the Statute of the Tribunal allow staff associations as such to file suit, the only way for them to safeguard their interests is for individual officials to act as their representatives in furtherance of the common rights and interests of the whole or part of the staff". The Tribunal is satisfied on the evidence that at every opportunity open to him the complainant protested that the recruitment procedure the EPO was following was unlawful. The conclusion is that the Administration prevented him from carrying out his duties as a member of the Selection Board in accordance with the Service Regulations, that he has a cause of action, and that his complaint is therefore receivable.

9. Turning to the merits the Tribunal observes that the notice of vacancy failed to comply with the requirements of Article 2(2) of Annex II; the Selection Board failed to draw up the list required by Article 5(1) of Annex II; only one candidate was interviewed; the Board failed both to draw up the list of suitable candidates and to make the reasoned report required by Article 5(4) of Annex II.

10. Over and above those flaws, the Tribunal finds no evidence before it to disprove the Appeals Committee's conclusion that the sole purpose of the procedure was to appoint Mr. Kirst to Directorate 5.1.3 "with a view to his subsequent appointment" as data protection officer. Since the Organisation wilfully infringed the provisions of the Service Regulations and failed to show proper impartiality in the matter of the appointment it committed an abuse of authority and the President's decision dated 12 October 1992 cannot stand.

11. The appointment of Mr. Kirst as lawyer in Directorate 5.1.3 as from 19 August 1991 must be set aside. That means that he was not lawfully a permanent employee of the EPO at the time when the post of data protection officer was advertised for internal appointment only and that he could not properly have the status of an internal candidate. The consequence is that his appointment to the post of data protection officer is also invalid. The Tribunal expects that the President will take such measures as will ensure that Mr. Kirst, who accepted the appointments in good faith, suffers no material injury.

DECISION:

For the above reasons,

1. The decision of 12 October 1992 by the President of the European Patent Office is quashed.

2. The appointment of Mr. Ludwig Kirst to the post of lawyer in Directorate 5.1.3 as from 19 August 1991 is quashed.

3. In consequence the appointment of Mr. Kirst to the post of data protection officer as from 1 July 1992 is declared invalid.

4. The Organisation shall pay the complainant 2,000 German marks in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas
William Douglas

P. Pescatore
P. Pescatore

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

AB Gardner
A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re VAN DER PEET (No. 17) Judgment 1316

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventeenth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 16 February 1993, the EPO's reply of 30 April, the complainant's rejoinder of 24 May and the Organisation's surrejoinder of 9 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 4(1), 5 and 7, of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Annex II to those Regulations;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Articles 4(1), 5 and 7 of the EPO Service Regulations read:

"4(1) Vacant posts shall be filled by the appointing authority, having regard to the qualifications required and ability to perform the duties involved:

- by transfer within the Office;
- by promotion or appointment ...
- by recruitment or appointment as a result of a general competition open both to employees of the Office and to external candidates.

5(1) Recruitment shall be directed to securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Contracting States.

...

(3) No particular post shall be reserved for nationals of any specific Contracting State.

> 7(1) Recruitment shall generally be by way of competition in accordance with the procedure laid down in Annex II. ...
>
> A procedure other than that of competition may be adopted by the appointing authority for the recruitment of ... senior employees ... and also, in exceptional cases, for recruitment to posts which require special qualifications.
>
> (2) For each competition, a selection board, the composition of which is laid down in Annex II, shall be appointed by the appointing authority. This board shall draw up a list of suitable candidates.
>
> The appointing authority shall decide which of these candidates to appoint to the vacant post."

The complainant, a Dutchman who was born in 1945, is a grade A3 examiner of patents at the EPO's headquarters in Munich.

On 22 May 1991 the Office published two notices of vacancy for a lawyer in the Legal Services Directorate (D 5.1.3), one inviting inside applicants and the other seeking applicants from outside the Organisation. The complainant was one of the two inside applicants. On 16 July 1991 the Director of Personnel offered the post on behalf of the President of the EPO to one of the eight outside applicants, Mr. Ludwig Kirst, who accepted it and took up his duties on 19 August 1991. The Director of Personnel told the complainant in a letter of 19 July 1991 that he had not been successful. On 29 August, he appealed against the President's decision.

On 21 January 1992 the President issued a notice inviting by 5 February applications for the post of data protection officer. There was a special edition of the EPO "Gazette" published on 29 June 1992 about the protection of personal data and in it the President announced that "following an internal selection procedure and after hearing the Central Staff Committee" he had appointed Mr. Kirst to the post.

On 26 August the chairman of the local Staff Committee in Munich wrote an open letter to the President stating the staff representatives' strong objections to the procedure and to the "gross infringement of the rules on recruitment".

The Appeals Committee submitted its report on 28 October 1992. It was unanimous that the procedure whereby Mr. Kirst had been picked for the post of lawyer was seriously flawed and its sole purpose had been to give him the job so as to make him data protection officer later. It recommended by a majority of three to two that the President revoke the appointment of Mr. Kirst and order a new recruitment procedure.

In a letter of 24 November 1992 a personnel officer signing on behalf of the Director of Staff Policy told the complainant that the President had turned down his appeal on the grounds that his qualifications did not meet the requirements in the notice of vacancy and so he had no cause of action. That is the decision under challenge.

B. The complainant alleges breach of Articles 4(1), 5 and 7 of the EPO Service Regulations. He submits that the requirements in the vacancy notice did not match the post to be filled and were misleading to candidates other than Mr. Kirst.

He contends that he acquired a thorough knowledge of the law governing employment at the EPO by helping colleagues with their internal appeals and as a member of the Home Loans Committee became conversant with the relevant rules and procedures. His work had given him a solid grounding in patent law and he would have stood a good chance of being chosen by the Selection Board. But instead of convening the Board as it ought under Article 7(2) of the Service Regulations, the EPO set up an "interview panel".

He alleges that the Organisation told Mr. Kirst before the vacancy was advertised - so that he could present his application accordingly - that he would get the post as lawyer and later the one as data protection officer.

It was the open letter of 26 August 1992 from the chairman of the local section of the Staff Committee to the President describing the whole process that alerted the complainant to serious flaws in the procedure and the President's abuse of authority.

He seeks:

(1) the quashing of the notice of vacancy for the post of lawyer, the recruitment and selection procedure and the offer of employment to Mr. Kirst;

(2) the quashing *ab initio* of Mr. Kirst's appointment as a permanent EPO official;

(3) an award of 6,000 German marks in compensation for the expense, lost time and moral injury which the unlawful procedure caused him;

(4) an award of 2,000 German marks in costs.

C. In its reply the Organisation states that the impugned decision caused the complainant no actionable injury. He had the opportunity to apply for the post and his name was on the list that went to the Selection Board. The reason why he was not appointed was that he did not have the right qualifications, being an electrical engineer, not a qualified lawyer. His legal experience was confined to applying European patent law to his own technical field, and even there he was closely supervised by Directorate 5.1.2, which deals with patent law. The work of Directorate 5.1.3 is purely legal and the complainant was obviously not fit for it. Indeed that was the Appeals Committee's unanimous conclusion.

Nor, for that matter, is he fit for the post of data protection officer, whose work is mainly legal and who must enjoy the trust of management and staff alike. The complainant lacks the tact, discretion and level-headedness such a position requires.

The successful applicant was a qualified lawyer. He had served in the judiciary, been in charge of the data protection programme of the German Ministry of Justice, and was undeniably fit for the post.

The complainant stood no chance of being appointed to a post he was neither qualified nor temperamentally suited for. He fails to show any personal interest in the quashing of Mr. Kirst's appointment. It is significant that he himself saw no point in applying for the post of data protection officer.

D. The complainant contends that examiners in Directorate-General 2 all perform duties of the kind set out in the notice whereas the candidate who was appointed had no such experience. In twelve years as examiner he had shown "the highest standard of ability, efficiency and integrity" required by Article 5, as is plain from his staff reports. He has always got on well with management, the Staff Committee and the Staff Union. His only defect was that he had never served in the German Ministry of Justice.

The EPO is in breach of the duty of trust and fairness it owes to its staff since only the "interview panel" knew that whoever was appointed to the post of lawyer would go on to become data protection officer. But it had become clear that that was the intention by the time the post of data protection officer was advertised in January 1992, and that was why he did not apply for it.

E. In its surrejoinder the EPO says that there is no new element in the rejoinder to prompt a change in its position. The complainant's forays into the law are no substitute for specialised training honed by practical experience. The paramount issue concerning his candidature is whether his qualifications for the post of lawyer was of the "highest standard", and the EPO maintains they were not.

CONSIDERATIONS:

1. The complainant is an electrical engineer by training. He joined the European Patent Office in 1980 as a patent examiner. On 22 May 1991 the Office published a notice of vacancy for a lawyer in its Directorate 5.1.3, which is in charge of legal services. The complainant applied for the vacant post and his name appeared on the list of candidates which the Administration drew up. By a letter of 19 July, however, it informed him that he had not been selected. The successful applicant was Mr. Ludwig Kirst. On 29 August 1991 he filed his internal appeal claiming the quashing of that appointment on the grounds inter alia that the selection procedure had been unlawful. In its report of 28 October 1992 the Appeals Committee was unanimous that the procedure showed serious errors, but that the complainant had not supplied evidence of his having the required knowledge and experience for the post and indeed it was doubtful "whether he had any real chance to be selected". By a majority of three to two the Committee recommended allowing the appeal, setting aside the appointment of Mr. Kirst and ordering a new procedure. But by a letter of 24 November 1992 the President of the Office informed the complainant that the appeal was rejected because he had not satisfied the requirements of the vacancy notice and therefore had no legitimate interest in the quashing of the appointment of Mr. Kirst. That is the decision now impugned and the complainant's claims are set out under (1) to (4) in B above in fine.

2. Since the material facts and the parties' pleas are fully set out in their written submissions there is no need for hearings and the complainant's application for them is disallowed.

3. In the EPO's submission the complainant has no right to challenge the procedure unless he can show that he had a personal interest and that his hopes of success were adversely affected by the procedure followed. The Organisation maintains that neither the procedure nor the decision he impugns adversely affected his interests since he had no prospect of being offered the post of lawyer he had applied for.

4. The plea is mistaken. The material question is whether the complainant's rights as a candidate for the post

were infringed. In accordance with Article 4 of Annex II to the Service Regulations the EPO included the complainant in the list of applicants eligible for consideration by the Selection Board and thereby accepted his candidature. So it may not now contend that he had no interest in the outcome of the procedure and has no right to challenge it.

5. Judgment 1315, also delivered this day, allows the related complaint brought by Mr. Richard Menapace against the EPO in regard to the appointment of Mr. Kirst as a lawyer in Directorate 5.1.3. It sets aside the appointment and states the reasons for doing so. The present complaint succeeds for the same reasons.

6. The President's decision of 24 November 1992 is quashed. There is no need to make any further order in this case on the complainant's claims (1) and (2). As regards his claim under (3), he is entitled to damages for the moral injury that the breach of his rights as a candidate for appointment as a lawyer in Directorate 5.1.3 caused him and the amount is set at 1,000 German marks. As to claim (4), he is awarded 2,000 German marks in costs.

DECISION:

For the above reasons,

1. The decision of 24 November 1992 by the President of the European Patent Organisation is quashed.

2. The Organisation shall pay the complainant 1,000 German marks in moral damages.

3. It shall pay him 2,000 German marks in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas
William Douglas

P. Pescatore

A.B. Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re AMIRA Judgment 1317

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Charles Mbagaya Amira against the International Telecommunication Union (ITU) on 4 September 1992 and corrected on 23 October 1992, the ITU's reply of 28 January 1993, the complainant's rejoinder of 8 April and the Union's surrejoinder of 28 May 1993;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal, Regulations 9.12 and 11.1 and Rule 11.1.1 of the ITU Staff Regulations and Staff Rules and Rule 4.7 of the Staff Rules governing technical assistance project personnel;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Kenyan born in 1938, is trained in electronics and business administration. The ITU first employed him from 14 September 1982 to 14 November 1983 as a senior expert at grade P.5 on a regional project for Africa. In January 1984 it gave him a fixed-term appointment to a P.5 post as an engineer in the Technical Cooperation Department of its General Secretariat at headquarters in Geneva. In 1985 it issued a notice of vacancy for the Senior Regional Representative for Africa at grade D.1 as head of its Regional Office for Africa in Addis Ababa. On 24 August 1986 it granted him a fixed-term appointment to the post. He got three extensions, the last of which expired on 30 September 1990.

By a circular letter of 9 January 1990 the Secretary-General announced the setting up on 1 January of a Telecommunications Development Bureau - commonly known as the BDT, the initials of its title in French - in response to recommendations adopted in 1989 by the Union's Plenipotentiary Conference in Nice. The complainant's post and those of the other senior regional representatives were transferred from the General Secretariat to the new body, which was to be directly answerable to the Secretary-General.

In a handwritten letter of 24 April 1990 to the Secretary-General the complainant spoke of "difficulties" in the exchange of information between headquarters and the Regional Office; with just over three months of his contract left he expressed "anxiety" about what was to become of him and of that Office.

By a letter of 27 April the Secretary-General informed him that the transfer of his post to the BDT and the need for a new job description would "imply" not extending his contract beyond its expiry on 30 June 1990; there appeared to be no suitable vacancy for him; but because of his "experience and qualifications" his contract was extended by three months "pending further examination of the situation"; and he might apply for any suitable vacant post that was advertised in the BDT.

Having got the Secretary-General's letter on 22 May, the complainant replied on 22 June. The letter had, he said, "surprised" him: he had a legitimate expectation of return to headquarters; the 1989 Conference had set aside funds for his post; staff at headquarters assigned to the BDT had had their appointments extended; and the decision not to renew his contract was likely to be "misunderstood" by African organisations with which the ITU had been working and by others.

In a letter to the Secretary-General of 26 July 1990 the Secretary-General of the Organization of African Unity (OAU) expressed fear that closing down the Regional Office would not help economic development in Africa.

In a telex of 7 August the acting Chief of the BDT ordered the complainant to stop work at Addis Ababa on 24 August and report to headquarters for "debriefing" on 27 and 28 August; put him on "terminal leave" as from 30 August; and spoke of various end-of-contract formalities.

In a letter of 10 August sent by fax the Secretary-General addressed the complainant's comments in the letter of 22 June: since his letters of appointment made him subject to the Staff Rules governing technical assistance project personnel and offered "no expectancy of renewal or of conversion to any other type of appointment" he had no grounds for expecting to return to headquarters; his post would have to be "discontinued"; and the Secretary-General was sending him through the office of the United Nations Development Programme (UNDP) in Addis Ababa a copy of the ITU's reply to the letter of 26 July from the Secretary-General of the OAU.

In a letter of 30 August the OAU's ambassador and executive secretary in Geneva gave the Organization's Secretary-General an account of a meeting that he and ambassadors from seven African countries had had on 29 August with the Secretary-General of the ITU; according to that account they had been told that the complainant's appointment would be extended only until 30 September - "for family reasons" - because the Plenipotentiary Conference had called for abolition of the senior regional representatives' posts.

By a letter of 17 September the complainant made a request for administrative review of the decision not to extend his appointment. In a letter of 25 September to the Secretary-General he sought to set the record straight on issues which he believed the Secretary-General had misrepresented at the meeting of 29 August with the African ambassadors.

The Secretary-General rejected his request for review in a letter of 29 October. On 28 January 1991 the complainant put his case to the Appeal Board. In its report of 26 May 1992 the Board concluded that the ITU had complied with the rules on fixed-term contracts. By a letter of 4 June 1992 the Secretary-General sent the complainant the Board's report. It is that letter, from which he infers rejection of his appeal, that he is now challenging.

B. The complainant submits that the decision not to renew his appointment shows mistakes of fact and of law. His pleas come under five main heads.

He first alleges procedural and formal flaws. The Secretary-General's "vague" and "ambiguous" letter of 27 April 1990 suggested that there was to be review of his situation with extension of his appointment in mind. But without so much as a reply to his letters of 24 April and 22 June 1990 the Secretary-General told him on 29 October that he had had "five full months" to make arrangements; so the Secretary-General had reached a decision without giving him a hearing. What is more, the acting Chief of the BDT, who on 7 August notified to him the decision to let his contract run out, held the same grade as he. By saying in his fax of 10 August that he fully agreed the Secretary-General gave the impression that the acting Chief of the BDT had acted on his own.

His second plea is that the Secretary-General failed to state the reasons for the decision. He just appended the Appeal Board's report to his letter of 4 June 1992, without comment. At best he may be said to have given "shifting and/or erroneous contradictory reasons" in communications of 27 April and 10 August 1990.

Thirdly, the complainant alleges bias and the misappraisal and neglect of essential facts. Contrary to what the Secretary-General told him, the Plenipotentiary Conference never recommended abolishing the senior regional representatives' posts: indeed that would have been contrary to its real intent. Nor were funds for the posts lacking. He suspects, for want of objective grounds, that the non-renewal was due to malice on the part of the acting Chief of the BDT, who saw him as a rival.

Fourthly, he alleges breach of his legitimate expectations of renewal. There were many reasons for him to expect renewal: his performance had been "very good", his post had a place in the BDT, and the notice of vacancy issued in 1985 announced that it was to be filled for two years and possibly five. Officials at headquarters, among them the acting Chief of the BDT, who like him had been transferred from the Technical Cooperation Department, had their appointments extended even though their job descriptions were also due for revision. The Administration singled him out as an "outposted" official of the General Secretariat for "humiliating and prejudicial treatment".

Lastly, he alleges breach of Staff Rule 11.1.1.4 f), which says that "the total duration of the procedure in any particular case shall not exceed 14 weeks from the date on which the appeal was submitted". In his case the Board took some one-and-a-half years to report and even then failed to examine the parties' submissions properly.

He seeks the quashing of the impugned decision, reinstatement in a D.1 post as from 1 October 1990 or, failing reinstatement, payment of his "salary and emoluments" as from 1 October 1990 to 30 June 1993. He also claims 80,000 Swiss francs in material and moral damages and 12,000 United States dollars in costs.

C. In its reply the ITU contends that the decision not to renew the complainant's appointment was at the Secretary-General's discretion. He took it in the Union's interest and it complied with the material rules and the letter of appointment, which stated that it carried "no expectancy of renewal".

Because of the Plenipotentiary Conference's wish to strengthen activities in the regions the Union's Administrative Council decided to do away with the senior regional representatives' duties and to assign new ones in the area of technical cooperation to the new heads of the Regional Offices. The difference between the two sets of duties "could hardly be greater". Since the Council did not change the duties of officials in the former Technical Cooperation Department the Secretary-General extended their contracts pending review.

The Union observes that the complainant was not an "outposted" member of the General Secretariat headquarters staff: his letters of appointment said that he was subject to the Staff Rules governing technical assistance project personnel.

It is plain from the Secretary-General's communications of 27 April and 10 August 1990 that he looked into the case thoroughly and the complainant was given his say. Moreover, the letter of 27 April left him in no doubt but that his appointment as Senior Regional Representative would end at 30 September 1990.

As to the competence of the acting Chief of the BDT the Union observes that since he was in charge of its work in the field he was empowered to act on the Secretary-General's behalf. The Union also maintains that the account of the meeting of 29 August with the African ambassadors was just the recollection of one man and was not reliable.

Though conceding that the internal appeal proceedings were "unduly protracted" the Union sees "culpable negligence" in the complainant's own procedural mistakes, such as failing to send his appeal to the competent officials by registered letter. In any event the Board "gave due weight" to all the documents which both parties put to it.

D. In his rejoinder the complainant develops his earlier pleas. He sees the ITU's reply as misleading and gratuitous. The senior regional representatives' duties related mainly to technical cooperation and were close to those of the new regional office heads under the BDT. For reasons that he explains the ITU's allegations of procedural mistakes do not square with the facts. He presses his claims.

E. In its surrejoinder the Union enlarges on its reply and seeks to refute the complainant's pleas, stressing, among other things, that the senior regional representatives' duties concerned "policy matters" while those of the new heads focus on "operational matters".

CONSIDERATIONS:

1. The complainant is a Kenyan and a telecommunications engineer. The ITU used to employ him at grade D.1. He wants the quashing of a decision by the Secretary-General not to renew the fixed-term appointment he held as the Union's Senior Regional Representative for Africa.

2. He took up duty with the Union on 4 January 1984 on a fixed-term appointment at grade P.5. At the outset he belonged to the Group of Engineers in the Technical Cooperation Department at headquarters in Geneva. A notice of vacancy issued in 1985 invited applications for an appointment under a fixed-term contract to the post of Senior Regional Representative for Africa, stationed in Addis Ababa. On 24 August 1986 the complainant was appointed to the post and promoted to D.1. The notice invited applications for an appointment for two years, with the possibility of extension by another three. The complainant had his appointment regularly extended and, in particular, by six months from 1 January to 30 June 1990.

3. A Plenipotentiary Conference which the Union held in Nice in 1989 gave new policy "directives", and the Secretary-General accordingly made preparations in 1989 and 1990 for reform of the Union's regional activities throughout the world. One of the reforms was the setting up of a Telecommunications Development Bureau, known as the BDT, which was to replace the old Technical Cooperation Department. The Bureau was to have regional offices for Africa, the Americas, Asia and the Pacific, and the Arab States, each of which was in turn to have several area offices within its jurisdiction.

4. By circular No. 3 of 9 January 1990 the Secretary-General informed the staff that the BDT was soon to be set up. The new "organizational structure" was described for the first time in general terms in a document, No. 6967, which the Secretary-General submitted to the ITU's Administrative Council on 26 April 1990. In June the Council approved that structure and the transfer of several posts. It appears on the evidence that the post the complainant then held was to be extended until 31 December 1993. More detailed organisation charts appeared early in September 1990.

5. The complainant sent the Secretary-General a handwritten letter on 24 April 1990 courteously expressing some of his worries: he was having difficulty in keeping in touch with headquarters; he was in ignorance of what they had in mind there; and he was uncertain about his own future at a time when his contract was running out.

6. On 27 April - the day after document 6967 had gone out - the Secretary-General informed the complainant by letter that he would not be renewing that contract; the Plenipotentiary Conference had, he explained, transferred the senior regional representatives' posts to the new BDT and intended to give them "completely revised job descriptions"; so "in view of the present staffing" there was no vacancy that the complainant could be "redeployed" to; but in view of his "experience and qualifications" the Secretary-General had decided to extend his appointment by three months "pending further examination of the situation" and was willing to consider any application from him for posts "advertised within the framework of the BDT".

7. The complainant got that letter on return from a mission in the second half of May 1990. In his reply of 22 June 1990 he said he was "surprised" at the decision considering the Plenipotentiary Conference's wish to strengthen the ITU's "regional presence" and at the Secretary-General's settling his case so hastily. He pointed out that headquarters staff who were to be transferred to the BDT had been given extensions of contract to 30 June 1993 pending the adoption of the reforms by the Administrative Council following the conclusions of a "High Level Committee" set up for the purpose. Considering that he too was a member of the headquarters staff, albeit one assigned to the field, he concluded by asking to be treated in the same way as everyone else.

8. It appears on the evidence that at about the same time the Secretary-General of the Union had been in correspondence about the abolition of the post of Senior Regional Representative for Africa with the Secretary-General of the Organization of African Unity (OAU); that he had seen that Organization's ambassador in Geneva and several African ambassadors; and that the complainant's recall and the downgrading of the Addis Ababa post had been arousing strong opposition in those quarters.

9. On 8 August 1990 the complainant got a telex dated 7 August from the acting Chief of the new BDT as well as a copy of a telex of even date which the Chief sent through the office of the United Nations Development Programme (UNDP). They gave information about the abolition of his post in Addis Ababa and his own and his family's repatriation and told him to report to Geneva for "debriefing" on 27 and 28 August. There came soon after, on 10 August, a letter sent by fax from the Secretary-General himself. The Secretary-General pointed out that the complainant was a member not of the headquarters staff but of "technical assistance project personnel"; said that his post was to be discontinued once and for all, in accordance with document 6967, which in the meantime the Administrative Council had approved; endorsed the telex of 7 August from the acting chief of BDT; and proposed seeing the complainant during the debriefing in Geneva. According to a postscript the

Secretary-General had in the meantime been corresponding about his case with the Secretary-General of the OAU and had also informed the Resident Representative of the UNDP in Addis Ababa, whom the complainant was dealing with regularly.

10. On account of the OAU's objections the ITU's Secretary-General gave an account of the framework for the Union's future work in Africa in letters of 3 September 1990 to the Secretary-General of the OAU and the United Nations Under-Secretary-General and Executive Secretary of the Economic Commission for Africa. In a letter of 25 September to the Secretary-General of the ITU the complainant commented on some disparaging remarks the Secretary-General had made about him at the meeting with the African ambassadors.

11. The Secretary-General having stood his ground, the complainant submitted to him on 17 September 1990 a fully argued request for administrative review. He alleged personal prejudice, which he said had been evident in his debriefing on 27 and 30 August; he had been discriminated against in that he had been refused the extension of appointment freely granted to others affected by reform; and the abolition of his post in Addis Ababa was in fact just a pretext for getting him out of the Union altogether.

12. In his reply of 29 October 1990 the Secretary-General reaffirmed that as a member not of the headquarters staff but of the technical assistance project personnel the complainant might not claim to be put on a par with the headquarters staff affected by reform; the Secretary-General had discretion in the matter; having been told of the decision on 27 April 1990 and got the three months' extension without even asking for it, the complainant had had five months to make arrangements; and since the "institutional, structural and administrative considerations underlying" the decision had been "spelt out" in the fax of 10 August 1990 there was no need to go into the complainant's "purely subjective" objections.

13. On 28 January 1991 the complainant filed an appeal with the Appeal Board against that unfavourable answer. He gave the background to the dispute and pressed his earlier pleas. He contended that all the replies from the Secretary-General had dodged the real issue, which was that his record of service had given him legitimate expectancy of renewal of appointment in the BDT. He had, he maintained, never been given proper notice, and by granting the three-month extension "pending further examination of the situation" the letter of 27 April 1990 had left the matter of renewal open. And he cited the Tribunal's case law, which in his submission made it plain that an Administration's exercise of discretion in the matter of renewal of fixed-term appointments was subject to judicial review.

14. It took a long time to set up the Board, which because of administrative shortcomings was unable to meet. The Secretary-General did not enter his answer to the appeal until 6 May 1991. After giving his own account of the dispute he argued in substance that the reform consisted at the first stage in matching the Union's regional activities more closely to specific needs in the field. The duties of the offices of the senior regional representatives were to be developed at a later date. So the job descriptions were quite different from those of the former regional representatives, and that was why the complainant's post had been done away with.

15. The Board met on 7 and 25 May 1992 and reported on 26 May. Its report fits into a single page and merely sets out its "conclusions": the D.1 posts were to carry "new responsibilities" in the context of "a complete review of the functions of the Regional presence" and for that reason the complainant had no expectancy of renewal of his appointment in the BDT. The report was passed on to him without comment under cover of a letter of 4 June 1992 from the Secretary-General.

16. It is that letter that the complainant is treating as the final decision. He filed his case with the Tribunal on 4 September 1992, and the defendant is not challenging receivability.

17. The complainant asks the Tribunal to quash the Secretary-General's decision, order his reinstatement or, failing that, award him material and moral damages, and grant him costs. He has five main pleas:

(a) There was breach of the rules on competence and administrative process in that the Secretary-General suddenly presented him with a fait accompli without having given him a proper hearing.

(b) No reasons were stated for ousting him from the Union or false reasons were given instead of the actual ones.

(c) There were mistakes of appraisal and essential facts were overlooked. For example, the decision on his case was attributed to the Plenipotentiary Conference and the Administrative Council when in fact the acting chief of the BDT, who himself stood to gain from getting rid of a potential rival, and the Secretary-General had combined against him.

(d) There was breach of his legitimate expectation of extension; he was discriminated against in the redeployment to the BDT of headquarters staff who had belonged to the old Technical Cooperation Department; and he was refused any proper help in finding other employment.

(e) The proceedings before the Appeal Board took far too long and were unfair.

18. The gist of the Union's reply is that his appointment ended ipso facto on expiry, that there were objective reasons for the decision, namely the need to reform the Union's regional efforts to foster development, and that as a result the duties of staff in the new regional offices were not the same as those of the former senior regional representatives.

The material issues and legal context of the dispute

19. The complainant's pleas are to some extent redundant, and the Union's manner of reply consists in addressing them seriatim instead of making a full and proper statement of its own case. The material issues and legal context of the dispute therefore have to be defined first.

20. One preliminary point is that, though the Union dwells on the issue at length, it is immaterial whether the complainant was a member of headquarters staff or of project personnel. It is clear from the Staff Regulations and the relevant Rules that the provisions on fixed-term appointments are in substance the same for both. Thus Regulation 9.12 reads:

> "a) A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment.
>
> b) Separation as a result of the expiration of any such appointment shall not be regarded as a termination within the meaning of the Staff Regulations and Staff Rules."

and Rule 4.7 of the Staff Rules governing technical assistance project personnel says:

> "a) Project personnel shall be engaged on temporary appointments which are for a fixed period and which expire without prior notice on the expiration date specified in the letter of appointment.
>
> ...
>
> f) A temporary appointment does not carry any expectancy of renewal, or of conversion to any other type of appointment."

21. Since the gist of both sets of provisions is the same, the Union is mistaken in relying on Rule 4.7 to rebut the complainant's charge of discrimination in favour of other staff who, unlike him, were transferred to the BDT. The charge therefore stands unanswered and will be taken up in the proper context below.

22. It should also be made clear that the above provisions have counterparts in the staff regulations and staff rules of several other international organisations: for the World Health Organization, see Judgment 268 (in re Bå); for the United Nations Educational, Scientific and Cultural Organization, 354 (in re Shalev No. 2); for the Pan American Health Organization, 469 (in re O'Connell); for the World Meteorological Organization, 972 (in re Unninayar); for the Food and Agriculture Organization of the United Nations, 1044 (in re Colagrossi); for the International Labour Organisation, 1145 (in re Durai); and for the World Intellectual Property Organization, 1154 (in re Bluske). The ruling on this case must be in line with what proves to be an important feature of the common law of international organisations, or at least of those that define contracts by category in determining relations with their employees. The complainant has cited the relevant case law, which the defendant ignores, and the main features of it are summed up below.

23. First, consistent precedent has it that even where an organisation's staff regulations say that a fixed-term contract is ipso facto extinguished on expiry non-renewal is to be treated as a distinct and challengeable administrative decision. An early ruling to that effect was in Judgment 17 (in re Duberg: see the second paragraph under the heading "Competence"), and the same idea has since run through all the case law on the subject. A more recent and especially succinct example is to be found in Judgment 1040 (in re Douglas) under 3:

> "Precedent is clear: even when someone has just a temporary appointment a decision not to renew it must be taken when the contract period is expiring ..."

That requirement is an indispensable safeguard of security of employment in the international civil service, which indeed, unlike many national civil services and some regional organisations, commonly grants fixed-term appointments.

24. Another point firmly rooted in precedent is that the Tribunal must in substance respect the exercise of discretion in any decision to terminate employment on expiry of the contract, but may review the lawfulness of any such decision

and in doing so will, again by virtue of clear precedent, determine from the circumstances of each case:

- whether the rules on competence, form and procedure were observed;
- whether the official was given reasonable notice, even if the contract did not require it;
- whether the decision was duly substantiated and the reasons for it were conveyed to the official in such a way that he might properly defend his interests;
- whether some material fact was overlooked or there was some obvious mistake of fact or of law; and
- whether the decision was taken in the organisation's interests or shows some abuse of authority.

Several recent rulings on the subject sharply define the ambit of such review in line with the case law affirmed from the outset: see Judgments 956 (in re Gianoli) under 2 and 3; 1262 (in re Scherer Saavedra) under 4; and 1273 (in re Oiga) under 8.

25. Though the complainant has put forward almost all the above pleas all that need be said is that according to the usual criteria there are two obvious flaws in the impugned decision which alone are fatal. One is the ITU's disregard of the basic procedural safeguards that are calculated to protect the staff against arbitrary management, including the inadequacy of the explanation for the decision. The other flaw is the failure of due process in the internal appeal proceedings. Both issues are taken up below.

Disregard of the safeguards of fair administrative process and inadequate substantiation

26. The communications from headquarters to the complainant show an unusually cavalier attitude that fails in the duty of care the Union owes its staff, especially when they are cut off in places far from where decisions are being taken. The duty is the more compelling where a staff member like the complainant has taken on a demanding job in the field, with all the drawbacks it has for him and his family. The salient facts are the following:

> Without affording the slightest explanation or justification the ITU suddenly announced in its letter of 27 April 1990 that it intended to terminate the relationship of employment forged by a series of contracts under which the complainant had served well.

> It showed unusual haste in getting rid of the complainant on the pretext that the Nice Conference had taken "decisions" and in anticipation of decisions which the competent body, the Administrative Council, did not take until the Secretary-General had declined to renew his contract.
>
> He was refused an extension although it was granted until 30 June 1993, seemingly with no difficulty, to other staff in the same position as he.
>
> Any direct and personal explanation was postponed until his debriefing on 27 and 30 August 1990, although by then the termination had become irrevocable because the post of Senior Regional Representative in Addis Ababa had been abolished and his family sent home.

As far as the essential question was concerned, the debriefing was a pointless exercise. In his capacity as head of the Addis Ababa office he ought to have been called to headquarters for talks long before the whole process had started.

27. The sequence of administrative action set out in detail above, and particularly the letter of 27 April and the telexes he got on 8 August 1990, show that the Union deliberately presented the complainant with a fait accompli without letting him defend his rights properly. Quite plainly the Secretary-General and the acting chief of the BDT ought to have freed his post before the arrangements for carrying out the desired reforms were made or approved by the competent body.

28. The duty to state the reasons for a decision forms part of any due administrative process. The Tribunal is not questioning that there was an objective need for the reforms the Union brought in if it was to make its regional work more efficient. In this instance that was the reason given, not for the actual reforms, but for the decision on the complainant's case. That being so, the Union ought to have explained to him why the reforms warranted removing him. It did not. More particularly, when it changed the content of the post he had been holding it ought at the same time to have explained why, in view of his qualifications and experience, which the Secretary-General had praised, he would or would not have fitted the requirements of the new regional representatives' job descriptions. There is a strong line of precedent on the duty to explain the reasons for non-renewal: see for example Judgments 268 (in re Bå); 448 (in re Troncoso) under 4; 474 (in re Gale) under 3 and 4; 544 (in re Bordeaux) under 2 and 3; 675 (in re Pérez del Castillo) under 9 to 11 and 17 to 19; 946 (in re Fernandez-Caballero) under 4 to 6; 1154 (in re

Bluske) under 3 to 7; 1230 (in re Filatkin) under 4; and 1298 (in re Ahmad No. 2) under 6. The Union ignored such precedents in taking its decision.

29. To sum up, it appears that at the critical moment, when the process of reform was directly affecting the complainant's position and interests, the Union did no more than take an irrevocable decision on his case for which it afforded no proper explanation and which he had no opportunity of challenging by due administrative process. Thus the arbitrariness of its action is clearly established.

30. Lastly, the Tribunal observes that thereafter it took precious little interest in redeploying him. Since he was a senior official redeployment did of course raise very serious difficulties, but it was not free on that account to neglect the fate of a staff member to whom it was bound by reciprocal obligations of loyalty that the complainant, for his part, has honoured throughout. Such neglect was the more to be regretted because by prematurely bringing two other organisations, the UNDP and the OAU, into discussion about his personal position the Secretary-General made his redeployment even less likely.

The Appeal Board's shortcomings

31. An internal appeal procedure that works properly is an important safeguard of staff rights and social harmony in an international organisation and, as a prerequisite of judicial review, an indispensable means of preventing dispute from going outside the organisation. In the event of a complaint it greatly helps the Tribunal in identifying the material issues of fact and law. Although the ITU's Staff Regulations make due provision for it by establishing a joint Appeal Board under Regulation 11.1, the Board did not function properly in the present instance.

32. The complainant's foremost objection is that the proceedings took too long. The Union retorts that his own behaviour was partly to blame, but that is unfair comment on someone who was living far from headquarters. The dates speak for themselves. He lodged his internal appeal on 28 January 1991. On the evidence the Board was not ready to function promptly at the time. The Union took over three months, until 6 May 1991, to enter a reply that ran to three-and-a-half pages. The complainant's rejoinder came in the second half of July 1991, and so by then the pleadings were complete. The Board did not meet until some ten months later, on 7 and 25 May 1992, to take up the case, i.e. over fifteen months after the lodging of the appeal.

33. The report which the Board submitted on 26 May 1992 is open to even more serious objections. It is terse and offers no reasoning on issues of fact or of law. There is no telling whether, as due adversarial process required, the Board took up the complainant's pleas and the Union's replies. Even though a report by an appeals body is not a judgment by a court of law, the report of 26 May 1992 does not come up to the minimum standards of justice that the complainant was entitled to.

34. The Union is wholly to blame for those shortcomings. The Appeal Board is set up under the Staff Regulations and the Union has a duty to keep it at all times in proper working order. Indeed Regulation 11.1 expressly lays such obligation on the Secretary-General. Since the Board is a joint body the Union plays a direct part in the functioning of the procedure in each case. Lastly, by endorsing the report without comment or qualification in his letter of 4 June 1992 the Secretary-General too assumed full responsibility for its contents.

Redress

35. For the foregoing reasons the impugned decision cannot stand. What, then, are the consequences of quashing it when the complainant held a fixed-term appointment that as such ceased to take effect upon expiry?

36. His main claim is to reinstatement in his former job and his subsidiary one to awards of material and moral damages.

37. Reinstatement is a form of restitutio in integrum that will afford proper redress when the holder of an indefinite appointment has been wrongfully dismissed. As the Union rightly observes, the complainant tends to pass off the non-renewal as dismissal when in fact his contract simply expired at the agreed date.

38. In accordance with the provisions quoted above a fixed-term appointment will automatically cease to have effect upon expiry. But according to the case law a contract of service, even if for a fixed term, creates in law a relationship of employment; that relationship exists in an administrative context and is subject to a set of staff regulations; and there may therefore be requirements or consequences that go beyond the bounds of the contract as such. So the Tribunal may consider ordering the reinstatement even of someone who held a fixed-term appointment provided that the circumstances are exceptional. It may do so when an organisation makes a practice of granting fixed-term appointments for the performance of continuing administrative

duties; or when some inadmissible administrative practice flaws the contractual relationship; or when an untimely non-renewal prevents the accrual of pension entitlements. See for example Judgments 17 (in re Duberg), 136 (in re Goyal), 1230 (in re Filatkin) and 1249 (in re Reznikov); and, on pension entitlements in particular, 245 (in re Meyer), 470 (in re Perrone), 1230, and 1298 (in re Ahmad No. 2).

39. There are no such circumstances here. At all points in his career the complainant knew full well that his contractual position was precarious. What is more, the level and nature of his duties were such that he was unusually vulnerable to changes in the Union's policy on external relations. His main claim therefore fails, since reinstating him would in the circumstances be tantamount to direct interference by the Tribunal in the structuring of the ITU's secretariat.

40. He is nevertheless entitled to a substantial award of damages for the material and professional injury that the Union's inadmissible manner of management caused him.

41. Because of the uncertainty he has been in for over three years - since the termination of his appointment at the end of September 1990 up to the date of this judgment - the equivalent of three years' salary and allowances will be a fair amount. But the Union may subtract therefrom any professional earnings he may have had in that period.

42. Lastly, he is entitled to 5,000 Swiss francs in costs.

DECISION:

For the above reasons,

1. The impugned decision by the Secretary-General of the ITU is set aside.
2. The Union shall pay the complainant damages for all forms of injury in an amount equivalent to three years' salary and allowances less any occupational earnings he may have had since 30 September 1990.
3. It shall pay him 5,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

Wm Douglas
William Douglas

P. Pescatore
P. Pescatore

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re DESENCLOS

Judgment 1318

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Lionel Desenclos against the International Labour Organisation (ILO), received by the Registry of the Tribunal on 17 April 1991 and corrected on 4 May 1993;

Considering Articles II, paragraph 4, and VII, paragraph 1, of the Statute of the Tribunal and Article 8, paragraph 3, of the Rules of Court;

Having examined the written evidence;

CONSIDERATIONS:

The complainant was under contract with the International Labour Organisation to provide "external collaboration" for a project in Haiti. He is objecting to the sums he was paid from 30 March 1987 to 31 March 1989.

Article VII(1) of the Tribunal's Statute stipulates that "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".

This complaint does not impugn any final decision. The complainant acknowledges as much himself. Moreover, he fails to show either that he has submitted to the ILO any claim which it has neglected to answer or that he has made any attempt beforehand to settle the dispute out of court in accordance with clause 25 of his contract. His complaint is therefore clearly irreceivable, and the Tribunal dismisses it as such in accordance with the summary procedure provided for in Article 8(3) of the Rules of Court.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-SIXTH SESSION

In re MOSCOSO

Judgment 1319

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Pilar Moscoso against the World Health Organization (WHO) on 31 December 1992 and corrected on 25 February 1993, the WHO's reply of 15 April, the complainant's rejoinder of 10 May and the Organization's surrejoinder of 16 June 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and WHO Staff Rules 510.1, 1040 and 1230 and paragraph 27 of the Rules of Procedure of the headquarters Board of Appeal of the Organization;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Peruvian citizen born in 1942, joined the staff of the WHO on 19 August 1989 under a fixed-term appointment for two years, the first on probation. She was stationed at headquarters in Geneva and held the post of finance officer at grade P.3 in the Treasury Unit of the Finance Section of the Division of Budget and Finance. On 29 August 1990 the WHO confirmed her appointment and granted her a within-grade salary increment.

In her second year her health declined and she was granted 23 days' sick leave. In a memorandum of 26 April 1991 to the Contract Administration Unit the director of the Joint Medical Service endorsed her own doctor's view that a change in her working conditions might help. The chief of that unit referred the matter on 30 April to the Chief of the Finance Section, who by a memorandum to her of 3 May 1991 gave her a temporary assignment under his own direct supervision. She took up her new duties on 6 May.

On 8 May the Chief of the Finance Section warned her that he was recommending letting her appointment run out on 18 August. She protested in a letter of 23 May to the Director of the Division of Personnel and applied for transfer to any suitable post in the Organization. She talked the matter over with the Director of the Division of Budget and Finance and with officials of the WHO's Regional Office for South East Asia (SEARO), in New Delhi. The upshot was that in a letter of 22 July the Administration offered her a temporary assignment at SEARO until 31 December 1991: she would have "travel status", which would entitle her to net basic salary and daily subsistence allowance, and unless she was reassigned her contract would end at 31 December 1991.

In her reply of 26 July she said she would go to SEARO only on the terms which the Director of the Division of Budget and Finance had offered her orally, namely under an appointment with six months' probation, post adjustment allowance at the Geneva rate and subsistence allowance.

In a letter of 2 August 1991 the Director of Personnel told her he saw no reason to pay her the post adjustment allowance at the Geneva rate while she was on assignment to New Delhi and he warned that her contract would end on 18 August with payment of three months' salary in lieu of notice if she did not accept the offer. In a letter of 8 August she turned it down. The Director thereupon confirmed in a letter of even date that her appointment would end on 18 August under Staff Rule 1040, on the completion of temporary appointments.

Also on 8 August the Administration sent her a report appraising her performance since 19 August 1990. It contained a recommendation by her second-level supervisor to withhold her salary increment.

On 19 August she lodged an appeal with the headquarters Board of Appeal against the non-renewal of her appointment. In a memorandum of 13 March 1992 the chairman of the Board sought further information under paragraph 27 of the Board's Rules of Procedure from one of her former supervisors, who replied in a memorandum of 27 March that he could not give it until he had seen the evidence before the Board. In its report of 28 May 1992 the Board held that it could not determine whether there had been "incomplete consideration of the facts" within the meaning of Staff Rule 1230.1.2 but, giving her the benefit of the doubt, it recommended paying her 10,000 United States dollars in damages and costs.

In a fax of 9 September 1992 the Director of Personnel told her on the Director-General's behalf that "recommendations were submitted to the Director-General but they were considered incomplete and the Board was requested again, in view of the additional information provided, to review and make appropriate recommendations to the Director-General". In a letter of

16 September the complainant asked the Director for copies of the report and of the "additional information" he had mentioned. In a fax of 29 September he told her that once the Administration had "obtained" the "supplementary written information" it had sought from her first-level supervisor under Rule 27 the Board would let her comment before it concluded its "deliberations". In a letter of 7 October to the Director she objected to what she saw as an attempt to reopen the appeal proceedings.

In a letter of 9 November 1992, the impugned decision, the Director-General informed her that he rejected the Board's recommendation that she should get the benefit of the doubt in respect of Staff Rule 1230.1.2 but granted her $4,000 in damages for "undue delay" and $1,000 towards costs.

B. The complainant submits that the Organization failed to take full account of the facts. She points out that on 8 May 1991 - long before her supervisors had written her last performance report - the Chief of the Finance Section recommended letting her contract run out.

She describes as "gravely improper" the Administration's attempts to resume the internal appeal proceedings after the Board had submitted its report; such resumption would have constituted a fatal flaw in the appeal proceedings.

She claims a total of $10,000 in damages and costs.

C. In its reply the WHO concedes that the procedure followed was "somewhat unusual" inasmuch as "the proceedings of the Board of Appeal were interrupted and a final decision taken before the completion of those proceedings".

The reason for the termination of the complainant's contract was not the shortcomings of her performance but her refusal to accept the reassignment "reasonably offered" to her under Rule 510.1, which declares officials in the Professional category to be subject to assignment "to any activity or office of the Organization throughout the world". The Organization made a "genuine effort" to place her and warned that she would have to go altogether in accordance with Rule 1040 if she refused its offer.

The WHO asks the Tribunal to "ratify" the payment to her of $5,000 in compensation for "delays arising out of the internal appeal process and for costs".

D. In her rejoinder the complainant points out what she sees as mistakes of fact in the WHO's reply. She contends that the internal appeal proceedings were not interrupted: the Board's recommendation of 28 May 1992 was final and served as the basis for the Director-General's final decision. As for the cause of termination, the Administration has shifted ground since it told the Board that its decision was "justified by the appraisal of her services during the second year of her appointment". In any event its offer of assignment to New Delhi was hardly a reasonable one: accepting it would have drastically reduced her income and uprooted her at a time when her health was poor.

E. In its surrejoinder the WHO maintains that the only reason why her appointment was not renewed was her refusal to accept reassignment to New Delhi. The WHO's earlier reference to her performance appraisal came in answer to an earlier objection of hers to the lawfulness of its offer. But that was quite reasonable: after all, her doctors had recommended a change, she had asked for it, and the Organization was to give her the benefit of travel status. But for her refusal, she would have been kept on at least until 31 December 1991 and might then have been promoted to grade P.4 as regional budget and finance officer.

CONSIDERATIONS:

1. The complainant joined the WHO at headquarters in Geneva on 19 August 1989. She was a finance officer at grade P.3 in the Treasury Unit of the Finance Section of the Division of Budget and Finance and she held a fixed-term contract for two years in the first of which she was on probation. She had her appointment confirmed on 29 August 1990 on the strength of a good first appraisal report.

2. In December 1990 she had to get medical treatment and was granted 23 days' sick leave. On 26 April 1991 her doctor prescribed a change in working conditions and accordingly she was temporarily assigned from 6 May 1991 to checking the leave records of headquarters staff and was given a different office. On 8 May the Chief of the Finance Section informed her that her appointment would end on 18 August 1991. In detailed comments dated 19 June 1991 appended to a report appraising her performance since 19 August 1990 her supervisor, the Chief of the Treasury Unit, said that she had carried out only "a small portion of her duties" and that her "inability to establish and

maintain satisfactory working relationships" also made her work "ineffective". The complainant stated her objections at length in observations dated 29 July 1991.

3. In a letter of 22 July 1991 the Chief of Manpower Resources Administration offered her a "temporary assignment" at the WHO's Regional Office for South East Asia in New Delhi, up to 31 December 1991, saying that she would be granted "travel status". After correspondence she refused the offer.

4. On 19 August 1991 she lodged an internal appeal with the headquarters Board of Appeal under Staff Rule 1230 against the decision not to renew her contract, alleging personal prejudice on the part of her supervisor, incomplete consideration of the facts and failure to observe or apply correctly the provisions of the Staff Regulations or Staff Rules or the terms of her contract.

5. The Board did not report until 28 May 1992. In its report it said that so as to shed light on some of the incidents that had preceded the non-renewal it had on 13 March 1992 written to the Chief of the Treasury Unit asking him to answer several questions. On the same day it had also written to the Director of Personnel to ask what was meant by the "travel status" the complainant had been offered on assignment to New Delhi. The Board said that it had put those inquiries in accordance with Rule 27 of its Rules of Procedure. It explained that in a memorandum of 27 March the Chief of the Treasury Unit had said he declined to answer in the meantime. The Board concluded on the issues that the complainant had raised that there was no proof of personal prejudice and that the Staff Regulations and Staff Rules and the terms of her contract had been correctly applied; but it recommended granting her 10,000 United States dollars in compensation and costs on the grounds that there were in the case "grey areas on which the information at its disposal failed to shed light".

6. On 29 August 1992 the complainant wrote to tell the Director-General of the hardships she was suffering and entreat him to inform her of his decision on her case "as soon as possible". By a fax of 9 September the Director of Personnel replied that the Board had submitted recommendations to the Director-General but they "were considered incomplete" and the Board had to meet again "to review and make appropriate recommendations".

7. After further correspondence the Director-General wrote the complainant a letter dated 9 November 1992 saying that he agreed with her that there had been "undue delay" in dealing with her case and that he would base his decision on

the Board's report of 28 May 1992; he appended a copy of that report; he said he accepted the Board's recommendations except on the matter of damages; and he granted her $4,000 in compensation for the delay and $1,000 in costs.

8. The only redress the complainant seeks from the Tribunal is an order that the WHO pay her the $10,000 recommended by the Board. The Organization invites the Tribunal to "ratify" the payment to her of the total of $5,000 in compensation and in costs.

9. It is difficult to understand why there was such undue delay in this case or why the Administration, which had the power to prevent much of it, did not do so. By causing or allowing such delay and by denying the Board of Appeal the information which would have enabled it to give a timely and complete opinion on the complainant's case the Organization fell short of the requirements of due administrative process and of the standards of care it must apply to its staff. In the circumstances the complainant is entitled to the sum of $10,000 she has claimed in damages and costs.

DECISION:

For the above reasons,

The Organization shall pay the complainant 10,000 United States dollars in damages and costs.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

Wm Douglas
William Douglas

P. Pescatore

Mark Fernando

AB Gardner
A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re FIGUERA DE PEREZ

Judgment 1320

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Helena Figuera de Pérez against the International Telecommunication Union (ITU) on 6 April 1993, the ITU's reply of 28 May, the complainant's rejoinder of 30 June and the Union's surrejoinder of 6 August 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 13 of the Rules of Court, Article 11.4 of the Constitution of the ITU, Regulation 6.2 and Rules 6.2.1 to 6.2.4, 11.1.1.2 a), 11.1.1.4 and 11.2.1 c) of the ITU's Staff Regulations and Staff Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. After several short-term appointments with the ITU in Geneva, the first of which began in January 1971, the complainant, a Spanish citizen who was born in 1936, got a two-year appointment on 1 May 1987. She had it regularly renewed. She was assigned as a copy typist at grade G.3 to the Spanish translation section of the Languages Division. She stayed there until 1991, when the section became part of the Document Composition Service. Her work included word-processing.

On 20 February 1992 she complained of pain and irritation in her left eye. The casualty department of the Institute of Ophthalmology at the Cantonal Hospital of Geneva gave her a check-up and found a corneal ulcer making her 100 per cent incapable of work. She then had several appointments at the hospital and from 28 February with Dr. Simon-Bernard, her own doctor. She was granted sick leave in accordance with medical certificates which variously declared her to be 100 or 50 per cent incapable.

A medical certificate of 4 May 1992 from her own doctor said that it would "help if, at least for a short while, she spent less time" on visual display units (VDUs).

On 19 May a new eye lesion appeared and the next day she went to the ITU's Medical Service, where she saw Dr. Cohen. On 25 May he had a talk on the telephone with Dr. Simon-Bernard which he supposedly recorded in a handwritten minute he put on her medical file.

She sent a memorandum on 29 June to the Chief of the Personnel and Social Protection Department applying for transfer to a job that took full account of her professional and physical capacity. She pointed out that nothing had been done to give her working conditions in which she could do her job with no risk of further eye lesions.

On 3 July she saw an eye specialist in Paris, who certified the same day that she was suffering from "severe dry-eye syndrome with recurrent ulceration"; she should be allowed to do "the sort of work that required focusing for only short periods with very frequent intervals" and should not do "work in air-conditioned rooms".

Having got no answer from the ITU to her memorandum of 29 June, she wrote to the Secretary-General on 13 July asking again for transfer to another job and claiming compensation for permanent impairment of eyesight and for moral injury.

In a report of 12 August to the Chief of Personnel the Director of the Medical Service recommended on the strength of her own doctor's findings transferring her to another division.

Having got no reply from the Secretary-General either, she filed a "complaint" with the Appeal Board on 27 August 1992 under Staff Rule 11.1.1.2 a) pressing the pleas and claims in her letter of 13 July.

By a memorandum of 1 September, of which the complainant got a copy, the Chief of the Conferences and Common Services Department told the Chief of Personnel that he was putting her provisionally on a post as receptionist on night watch.

The complainant wrote to the Chief of that Department on 2 September to ask what the job entailed and she learned from a job description given to her on 3 September that it included night shifts as receptionist.

In a memorandum of 2 September to the Chief of the Pensions and Insurance Service she asked for repayment by the Staff Health Insurance Fund of a fifth of her medical costs on the grounds that using VDUs was to blame for her recurrent eye lesions.

On 14 October 1992 the Chief of the Department offered to let her resign on terms to be negotiated, but she refused.

In a memorandum of 16 October he offered her two other jobs, but she did not answer.

In his reply of 19 October to her memorandum of 2 September the Chief of the Pensions and Insurance Service said that in the opinion of the Director of the Joint Medical Service her condition was not attributable to the performance of her duties.

On 26 October she took up the duties she had been seconded to.

On 30 November the Chief of Personnel notified to her a decision taken on the Secretary-General's behalf to second her to the post as receptionist on night watch at grade G.3.

By a letter of 7 December 1992 she told the chairman of the Appeal Board that the Secretary-General had not sent her a copy of the Board's report and that in accordance with Staff Rule 11.2.1 c), if the Secretary-General failed to take a decision within 60 days, she would take the view that she had exhausted the internal means of redress.

On 5 February 1993 she applied for two vacant posts as clerk. The Secretary-General appointed her to one of the posts by a decision of 5 April.

By a memorandum of 11 February she asked the Medical Service to let her have a copy of Dr. Cohen's handwritten minute of 25 May 1992 from her medical file, but the Medical Service refused in a memorandum of 17 February 1993.

Since the Secretary-General had failed to take a decision by 1 February 1993 on her "complaint", she concluded that her internal remedies were exhausted and she filed this complaint with the Tribunal on 6 April 1993.

B. The complainant puts forward several pleas.

She submits that the Union failed to observe the rules on staff health protection in Regulation 6.2 and Rules 6.2.1 to 6.2.4, which call for preventive action. Service Order No. 48, which the Secretary-General issued on 28 November 1985 under the heading "Conditions of work for operators of visual display units", overlooked several points which the Director of the Joint Medical Service had raised in a memorandum of 8 December 1983 to the Chief of Personnel about conditions of VDU work.

She submits that because it was remiss the Union is liable for her recurrent eye lesions. Paragraph 7 of Service Order 48 says:

> "If an official is medically unable to take up or continue work on a VDU for reasons of health as certified by the Joint Medical Service, suitable action will be considered for transferring permanently or temporarily the official to another post or assigning him/her with different tasks."

But the administration took no "suitable action", despite the certificates from her own doctor and the report of 12 August 1992 by the Director of the Medical Service.

She alleges that Dr. Cohen told her own doctor on the telephone on 25 May 1992 that he would be sending the Chief of Personnel a report recommending no word-processing for six months and transfer to another unit. But he "retracted" under pressure from the Personnel Department, which dissuaded the Medical Service with arguments that were other than medical, wrong and disparaging in that they harmed her professional reputation and her dignity.

By refusing to let her have a copy of Dr. Cohen's handwritten minute of 25 May the Medical Service infringed the right that any staff member has to see his own case records, withheld evidence and obstructed the course of justice. She asks the Tribunal to order disclosure and she releases the Medical Service from its professional obligation of secrecy.

She submits that the appeal procedure was flawed on two counts. It was in breach of Rule 11.1.1.4 a) for the Secretary-General not to send the chairman of the Appeal Board within four weeks a reply to her memorandum of 27 August. It also offended against Article 7 of the Universal Declaration of Human Rights, which guarantees equality before the law. Furthermore, the Appeal Board failed to meet the time limits in Rule 11.1.1.4 for processing appeals.

The Chief of the Conferences and Common Services Department abused his authority by seconding her on 1 September 1992 to the post as receptionist on night watch. Only the Secretary-General may transfer someone to a post with duties different from those in the original letter of appointment. Since the decision to second her was not taken until 30 November 1992 transfer prior to that date was unlawful. It was a blatant trick to get her to disobey so that she could be dismissed. On 14 October 1992 when she tried to get exemption from night duty because of anxiety over the responsibility and risk, the Chief of the Department summoned her and told her "any private business would have sacked you long ago" and "the ITU is not a charity" and if she refused night duty she would be dismissed at once. Such remarks were an affront to her professional and personal dignity and amounted to intimidation.

She points out that what the Director of the Medical Service said about the link between her eye ailment and VDU work was inconsistent. His report of 12 August 1992 did not tally with his remark in a letter of 23 September 1992 to the Chief of the Pensions and Insurance Service that "the lesions are caused by a disorder that is not attributable to work". As her own doctor established what is decisive is that they occurred during and because of work.

She submits that all those factors, the dangers of night duty and mental stress caused her serious moral injury.

She asks the Tribunal to (a) order the Secretary-General to transfer her to another post corresponding to her grade, background and physical condition; (b) rule that the corneal lesions constitute four occupational accidents and to order the Secretary-General to pay her 200,000 Swiss francs in damages; (c) instruct the health insurance fund to compensate her for the permanent impairment of eyesight caused by the corneal lesions; (d) credit her with days docked for sick leave from 20 February to 12 October 1992; and (e) pay her 200,000 francs in damages for physical and moral injury and emotional stress and 10,000 francs in costs. In a letter of 23 April 1993 to the Tribunal she withdrew claim (a).

C. In its reply the Union first addresses the facts.

It asserts that for an experienced typist copy work requires little or no looking at the VDU screen, and it took that into account as far as possible in assigning her new tasks after reform of her section. So it was at pains to change her job as little as possible, despite the demands of reform, long before her ailment began.

It points out that she took sick leave unusually often both before and after the lesions occurred.

She applied for transfer before then but the technical nature of Union work and dwindling funds made it hard to meet her request.

Since her ailment kept her off work only for a while any decision about working conditions and possible transfer still lay with the Chief of the Department; so he committed no abuse of authority by seconding her.

As soon as the Medical Service had issued its report of 12 August 1992, steps were taken to relieve her of VDU work.

Early in September she was transferred to a post at the same grade as receptionist. The working conditions of such staff in the ITU are much as in other intergovernmental organisations in Geneva. Besides, the transfer was only temporary - as was borne out by her later appointment as clerk on a post that had become vacant - and enabled her to work without strain on her eyesight.

Turning to the complainant's pleas, the ITU submits first that although, as she says, the memorandum of 8 December 1983 from the Director of the Joint Medical Service differs from Service Order 48, that is because the Union constantly updates data-processing equipment.

Her charge that it was remiss is groundless. Doing copy work half the time or even all the time after 26 February 1992 cannot have made her condition any worse.

It is libellous of her to say that the Personnel Department sought to deter the Medical Service and that evidence was withheld. The Union could not be expected any more than she to know what Dr. Cohen's minute said or why the Medical Service had refused to disclose it.

She has no grounds whatever for pleading breach of the appeal procedure. When she went to the Board there was no challengeable administrative decision yet because the process of transfer was not complete. Besides, the matter was in the process of being settled, as events later showed.

The offer of agreed termination was not an attempt to intimidate; far from it: some employees want such an arrangement on reaching the complainant's age.

Turning to her charge of inconsistency against the Director of the Medical Service, the Union cites a memorandum of his of 5 May 1993 to the deputy chief of Personnel denying a link between her eye disorder and her work.

It asks the Tribunal to set aside the complaint as devoid of merit.

D. In her rejoinder the complainant alleges a formal flaw: the ITU's reply is signed by the Chief of Personnel and not by the Secretary-General who, according to Article 11.4 of the ITU Constitution, acts as the Union's legal representative.

Not until she had eye trouble did she ask for transfer and she was fully aware of what Dr. Cohen said in his minute of 25 May 1992.

Appointing her to a post as clerk had nothing to do with the recommendation of 12 August 1992 by the Director of the Medical Service or paragraph 7 of Service Order 48. It shows the Union's bad faith: it was not on its own initiative that it transferred her to a post that had "become vacant", but on a recommendation by the Appointment and Promotion Board: she went through the channels ordinarily open to anyone.

She maintains that there was a connection between her eye lesions and her work: she had never had eye trouble before.

She is dismayed to learn that her medical records include a copy of her complaint to the Tribunal.

E. In its surrejoinder the Union answers her charge of a formal flaw in the Secretary-General's not signing its reply. It explains that the Secretary-General has expressly delegated authority - to the Chief of Personnel among others - to sign submissions to the Tribunal.

It is not seeking to deny the complainant's eye ailment but maintains that she applied for transfer long before it occurred.

It stresses that her almost unbroken absence from 26 February 1992 onwards explains why her health had to improve before any proper solution could be found.

It contends that there is nothing unwarranted about forwarding the complaint and its own reply to the Medical Service, since the complainant has made several allegations against the Service.

CONSIDERATIONS:

1. The complainant held short-term appointments from January 1971 with the ITU. It appointed her on 1 May 1987 as a copy typist in the Spanish translation section of its Languages Division. She had her appointment renewed first to 30 June 1991, then to the end of September 1996, the month in which she was to reach the age of 60. In June 1991 her section was incorporated in the Documents Composition Service and she was then required to do a great deal of electronic data-processing. From 20 February 1992 she complained of serious eye-strain, particularly recurrent corneal ulcers. On the strength of medical certificates she applied on 13 July 1992 for transfer to a post suited to her physical and professional

abilities. She asked for a credit of sick leave from 16 March 1992 which she said she would not have needed if the Union had observed proper standards of work on a visual display unit (VDU) and if the Medical Service had reacted more promptly. She claimed damages. Having got no answer, she appealed to the Appeal Board on 27 August 1992. The Board not yet having reported, she rightly took the view that she had exhausted the internal means of redress and she filed this complaint on 6 April 1993. Receivability is not at issue.

2. The complainant is challenging the validity of the ITU's reply on the grounds that its submissions ought to bear the signature of the Secretary-General or the Legal Adviser, not of the Chief of the Personnel Department. She is mistaken. According to Article 13(2) of the Rules of Court a defendant organisation may be represented by any serving or former official. It is so represented here: the Chief of Personnel may properly represent the Union.

3. Turning to the merits the Tribunal observes that on 1 September 1992 the complainant left her old job, which she said was causing her eye-strain, and was put on night-shift duties as a receptionist. She later applied for a post as a clerk in the Conference Documents Section and was put on it on 1 April 1993. She thereupon waived her original claim to transfer to a post in line with her grade and physical and professional abilities, and the Tribunal duly notes such waiver.

4. Her other claims hold good: that her ailment be treated as service-incurred and entitle her to damages; that the Secretary-General seek compensation for her from the health insurance scheme; that she be credited with the sick leave she had to take from 20 February to 12 October 1992; and that she be awarded damages for physical and moral injury and emotional stress.

5. Her pleas fail. What she is claiming is not an invalidity benefit but damages from the Union for the injury under various heads she says she has incurred in its service. But her arguments in support of such claims are unsound for the reasons set out below.

6. First, she contends that the Union ought to have enforced the standards of the Joint Medical Service that govern VDU work throughout the United Nations common system; since it failed to do so it was in breach of its duty to safeguard staff health. In fact the recommendations which the Director of the Joint Medical Service made in 1983 were not binding in all respects on the ITU. As it maintains, the Union was free to

take account of changes in electronic data-processing equipment in updating the conditions of VDU work. There is not a shred of evidence to suggest that it required staff to work in dangerous conditions and thereby acted in breach of its duty to protect their health.

7. Secondly, the complainant submits that by taking too long to transfer her to a job with no VDU work the Union caused her ailment to recur and made it worse. But the Union shows that after it got the first medical certificate - the one dated 26 February 1992 - she did such work for only twenty days half time and four days full time, and after the Union got the medical certificate of 12 August 1992 she did none at all. Although the duties she was given on 1 September 1992 did not suit her they took account of her eye trouble.

8. Her third argument is that the Personnel Department put pressure on the Medical Service and gave a doctor there wrong information that was calculated to injure her reputation and dignity. Again she offers not a jot of evidence to bear out that contention or to cast doubt on the independence and impartiality of the doctors in charge of her case.

9. Fourthly, she maintains that by refusing to let her have the text of a minute of 25 May 1992 in her medical records the Medical Service has denied her the right to prove her case. Although an international civil servant may be granted access to his medical records on the responsibility of the doctor who has them, the complainant acknowledges that she had read out to her twice, on 24 July and 3 August 1992, the minute that the doctor of the Medical Service had written recording a conversation he had had with her own doctor on 25 May 1992. So she knew what the minute said - indeed she cites it in her pleadings - and may not properly plead breach of her right of access to her medical records. The Union refused to let her have the text of the minute. In the circumstances of the case the Tribunal sees no point in ordering its disclosure.

10. Fifthly, she pleads flaws in the procedure followed by the Secretary-General and by the Appeal Board: both of them, she says, failed to give express answers to her claims. The Union retorts that it was not bound to give an immediate answer to her application for transfer and that she was not really challenging any administrative decision when she instigated proceedings since the process of transfer had not been completed. In fact the issue is irrelevant since the absence of reply from the Union and the Appeal Board has not prevented her from bringing the dispute to the Tribunal. Since any flaws there may have been in the procedure have caused her no injury her pleas fail, in particular those she founds on breach of the Staff Regulations and Staff Rules and the Universal Declaration of Human Rights.

11. Sixthly, she accuses the Chief of the Conferences and Common Services Department of abuse of authority and of attempts by threat and intimidation to humiliate her and injure her dignity. But it is plain on the evidence that what prompted her transfer to new duties on 1 September 1992 was a desire to meet her wish to stop VDU work. And making her the offer of agreed termination cannot be seen in the circumstances as improper pressure tantamount to abuse of authority. In general there is no evidence to bear out the charges of bad faith and contempt that garnish her pleadings.

12. Lastly, she sees shifts in the Medical Service's findings. She is wrong. The memorandum that its Director wrote on 5 May 1993 makes the medical background plain by saying that she "shows an ailment that warrants her taking several precautions at work and in everyday life" and that "the Medical Service has therefore prescribed adaptation of her work" but that "that does not mean that the ailment is service-incurred". The conclusion to be drawn is not at odds with the medical certificates in her records: although the state of her health argued against giving her VDU work - and that was why the ITU transferred her to another unit - her eye ailment was not attributable to the performance of her duties.

13. Such being the medical findings, the Tribunal disallows her claim to have her eye lesions declared to be service-incurred. Her complaint therefore fails in its entirety.

DECISION:

For the above reasons,

1. The Tribunal notes the complainant's waiver of her claim to transfer to a post in line with her grade and physical and professional abilities.

2. Her other claims are dismissed.

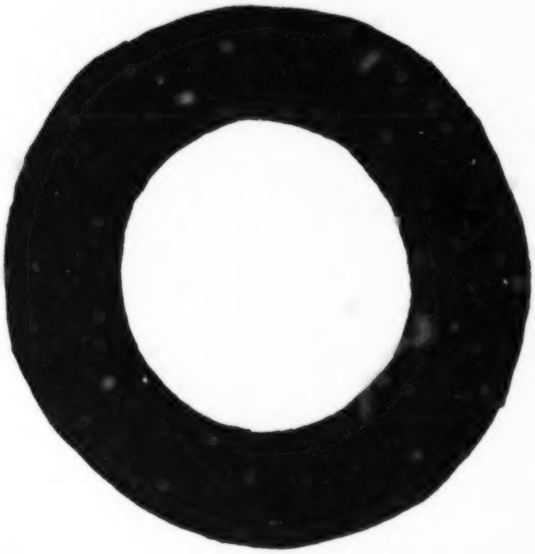
In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner



ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re BERNARD

Judgment 1321

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joseph Jacques Bernard against the European Organization for Nuclear Research (CERN) on 17 March 1993 and corrected on 8 April, CERN's reply of 5 July, the complainant's rejoinder of 10 September and the Organization's surrejoinder of 1 November 1993;

Considering Article II, paragraphs 5 and 6, of the Statute of the Tribunal, Rule II 6.01 g) of the CERN Staff Rules, Regulations R II 4.01, R II 4.09, R II 4.16, and R II 6.06.3 of the CERN Staff Regulations and Annex R A 10 g) to those Regulations;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen, joined CERN on 1 April 1968 as a "supernumerary" assembler of electronic equipment. On 1 April 1972 he was granted a fixed-term appointment and he had it converted to an indefinite one on 1 July 1974. His last job at CERN was as an electronics technician.

He had to take sick leave several times in his last few years at CERN. Since such leave totalled almost 24 months over 36 his case was put to the Joint Advisory Rehabilitation and Disability Board on 8 November 1991 under Regulation R II 4.16 of the CERN Staff Regulations. In a letter of 19 November from its chairwoman to the Director-General the Board said that his poor health precluded "work of any kind" and recommended dismissing him, in accordance with Rule II 6.01 g) of the Staff Rules, on the grounds of "disability confirmed by a medical certificate" and "not incurred in the course of duty". It also proposed that since the Organization was required to give him three months' notice his appointment should be terminated at 29 February 1992 and that, in recognition of his 23 years' good service, he should be paid a "grant" equivalent to 10 per cent of the maximum amount prescribed in Annex R A 10 g) of the Staff Regulations.

By a letter of 29 November 1991 the head of Administration notified to the complainant the Director-General's approval of the Board's recommendations, and in a letter of 18 December the Personnel Division told him, among other things, that he would be "deemed to have taken the balance of ... annual leave during the period of notice" he was entitled to under Regulation R II 6.06.3.

In a letter of 26 March 1992 to the Leader of the Personnel Division he sought payment of compensation for accrued leave: "because I was on sick leave during the period of notice I was unable to take the 40 days' leave still due". The Leader of the Division rejected his claim in a letter of 9 April on the grounds that, under Regulation R II 4.09 of the Staff Regulations*, only where it is owing to "the requirements of duty" that annual leave has not been taken may compensation therefor be paid on termination.

On 20 May 1992 the complainant lodged an appeal against that decision with the Joint Advisory Appeals Board. In its report of 2 December the Board held that the financial terms of his dismissal "expressly" precluded payment of compensation for accrued annual leave and that if he were to succeed anyone might on retirement claim a sum in compensation equivalent to up to two months' pay. It therefore recommended against paying him for the accrued leave, and by a letter of 18 December the Director of Administration told him that the Director-General was upholding the decision. He wrote to the Director-General on 28 January 1993 asking him to reconsider, but the Director-General refused in a letter of 22 February, the impugned decision.

B. The complainant submits that annual leave granted under Regulation R II 4.01 is an entitlement intended to give staff time for rest. So someone will be entitled to compensation in lieu if he is unable to take such leave for reasons beyond his control, for example, where the Organization refuses leave or orders dismissal on the grounds of medically certified disability. CERN prevented him from using up his leave entitlement by terminating his appointment when he was on sick leave.

---

* "On termination of service, a member of the personnel who has not been able to take all his annual leave owing to the requirements of duty shall be paid an amount equal to the remuneration due for the period of annual leave to which he is entitled".

In his submission it is CERN's practice to make payment in lieu where death or some medically certified service-incurred disability precludes the taking of leave because those are reasons beyond the staff member's control, even though the Organization does not treat such contingencies as being covered by "the requirements of duty". So by analogy it should treat on a par someone whom an illness that is not service-incurred has prevented from taking annual leave.

The complainant asks the Tribunal to quash the Director-General's decisions of 18 December 1992 and 22 February 1993 and to award him payment for the 40 days' annual leave he did not take, possibly with interest, and costs.

C. CERN replies that the complaint is devoid of merit.

It points out that the complainant was dismissed in accordance with Rule II 6.01 g) on grounds of an illness that was not service-incurred and that under Regulation R II 4.09 compensation is due for any balance of annual leave only if the reason why the staff member was unable to take it was the requirements of duty. How can an illness which was not service-incurred, like the complainant's, come under such requirements? There can be such requirements only if the staff member is prevented from taking leave for reasons related to the performance of his duties.

CERN rejects the two pleas put forward by the complainant in support of his claim. He contends that the reasons for his dismissal related to the requirements of duty because it was the Organization that took the decision, but that is to blur the dismissal with the reasons why he had to stop work, and he is misreading R II 4.09. To submit that CERN should compensate accrued leave wherever any reason at all beyond his control may have prevented a staff member from taking all of it, is to overlook the condition for payment in R II 4.09, which is that the reason for not taking the leave should have been the requirements of duty.

Only in two contingencies is it CERN's practice to pay compensation when that is the reason for not taking leave: one is an overload of work and the other is service-incurred illness. By way of example the Organization cites the case of someone it dismissed - just a few months before the complainant left - on grounds of medically certified disability that was not service-incurred. Although on termination that employee still had a balance of annual leave that had accrued both while he was at work and during sick leave, he was paid compensation only for the days of leave that an overload of work, as certified by the head of his division, had prevented him from taking. There is no reason to treat the complainant any differently.

Lastly, CERN explains that although, being an "exceptional contingency", death does not come under the "requirements of duty" and although it is under no duty to do so, it pays the successors compensation for any balance of annual leave at the date of the staff member's death.

D. In his rejoinder the complainant acknowledges that in his last years at CERN he had to take sick leave several times. He points out, however, that that was because his working conditions, particularly between 1973 and 1976 - overwork, noise and so forth - caused a nervous breakdown. On what grounds can the Joint Advisory Rehabilitation and Disability Board have found that his illness was not service-incurred when he had no medical check-up but just an interview with its members?

Because of his ailments he had neither the opportunity nor the time to take all his annual leave during the period of notice, as CERN asked in its letter of 18 December 1991. What is more, the letter neither warned him he would get no compensation for the balance of leave nor mentioned Regulation R II 4.09, and he thought no more about the matter until the Leader of the Personnel Division wrote to him on 9 April 1992 referring to the Regulation. But by then the period of notice had long expired. So the Organization prevented him from properly defending his interests.

R II 4.09 does not define "requirements of duty". The construction CERN puts on it - which restricts payment for any balance of leave to cases of service-incurred illness and death - is questionable or even far-fetched.

CERN is inconsistent: it refuses to compensate him for leave which his illness prevented him from taking but generously grants paid leave to employees who are perfectly fit as part of its so-called "voluntary" departure scheme.

He questions the impartiality of the Joint Advisory Appeals Board and wonders on what grounds it concluded that the financial terms of his dismissal "expressly" excluded payment in lieu of the leave he had not taken, and why it compared him to someone who had retired.

The precedent the Administration cites to illustrate its practice regarding payment for untaken leave is irrelevant: like him, the employee in question was prevented from taking all his leave by illness, the overload of work being merely incidental.

E. In its surrejoinder CERN submits that the complainant may not now challenge the findings about the origins of his illness: that that illness was not service-incurred is no longer at issue.

In its letter of 18 December 1991 CERN did not ask him to take all his remaining leave but merely pointed out that it was supposed to be taken during the period of notice so that he would know that he could make no claim for any leave he did not take. So its warning that he was subject to R II 4.09 did not come too late.

The Organization maintains that the term "requirements of duty" in R II 4.09 refers only to work and does cover service-incurred illness.

What the complainant says about the Board's partiality is unsupported and unfounded.

CERN does not pay compensation to someone who is granted special paid leave in the last few months before retirement.

CONSIDERATIONS:

1. CERN recruited the complainant in 1968 and granted him an indefinite appointment on 1 July 1974. Because he was in poor health his case was put to the Joint Advisory Rehabilitation and Disability Board, and on 19 November 1991 it declared him unfit for service. On its recommendation the Director-General decided on 29 November 1991 to dismiss him on 29 February 1992 - a date that took account of the required three months' notice - on the grounds of "disability confirmed by a medical certificate" and "not incurred in the course of duty". The Personnel Division told him in a letter of 18 December 1991: "You will be deemed to have taken the balance of your annual leave during the period of notice".

2. By a letter of 26 March 1992 he claimed the payment of the 40 days' leave he said he had been unable to use because he had been on sick leave during that period. But by a letter of 9 April 1992 the Leader of the Personnel Division answered that according to Regulation R II 4.09 of the Staff Regulations

only where the reason for not taking annual leave was "the requirements of duty" would compensation be paid for such leave on termination. The complainant appealed against that decision to the Joint Advisory Appeals Board. In its report of 2 December 1992 the Board recommended rejecting the appeal, and the Director-General did so in a decision of 18 December 1992, the one now under challenge.

3. The only material issue is whether the complainant is entitled to payment of compensation for the balance of annual leave on termination. The gist of his pleas in support of the claim is that when CERN orders dismissal on the grounds of disability and the staff member cannot take annual leave in time the termination comes under "requirements of duty" within the meaning of R II 4.09.

4. The Organization demurs on the strength both of the material text and of its own usage. It is - says CERN - clear from R II 4.09 that to qualify for compensation for the balance of annual leave the staff member must have had his appointment terminated and must have been prevented from taking his annual leave "owing to the requirements of duty". CERN argues that the two conditions are distinct in that the reasons for termination may have nothing to do with the requirements of duty, for example where the official resigns or dies. There may also be dismissal, as in this case, on grounds of disability.

5. The Organization's reasoning is sound. The notion of "requirements of duty" is relevant only where such requirements have prevented the staff member from taking annual leave. An example of such requirements is a heavy burden of work; personal convenience or other reasons that have nothing to do with work will not do. So where the reason for not taking leave is an illness that is not service-incurred the case will fail to satisfy one of the conditions in Regulation R II 4.09 because the reason is not "the requirements of duty".

6. The complainant cites in support of his claim CERN's practice of paying compensation to the successors of a deceased staff member for any balance of annual leave at the date of death. The Organization itself acknowledges that death is not a contingency covered by the term "requirements of duty", provided that the death is not service-incurred. But the complainant may not rely on that exception, which is contrary to the letter of the rules. As the Tribunal has said more than once, a staff member may not rely upon an unlawful act or a benefit granted ex gratia to other staff in support of his own claim.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

RGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re ANDERSON Judgment 1322

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rolf Ingemar Anderson against the International Telecommunication Union (ITU) on 23 February 1993, the ITU's reply of 26 March, the complainant's rejoinder of 20 April and the Union's letter of 14 May 1993 to the President of the Tribunal;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Regulation 3.15 and Rules 3.4.2, 4.12 b) and 11.1.1.2 b) of the ITU Staff Regulations and Staff Rules;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a Swedish citizen who was born in 1933. The ITU employed him at its headquarters in Geneva for many years. On 1 October 1984 he changed from the General Service category of staff, in which he had held grade G.7, to the Professional category, in which he was granted grade P.3. As an official of the ITU he paid contributions to the United Nations Joint Staff Pension Fund.

In 1989 the contributions he was paying to the Fund towards his pension on retirement were lower than those he would have been making had he still had grade G.7, the reason being the fall since 1984 in the rate of exchange for the United States dollar against the Swiss franc. In a letter of 12 June 1989 to the Secretary-General he asked that "special measures be applied" to ensure that his promotion would "not result in a future pension level below what would have been obtained if not promoted". Having got no answer within the time limit of six weeks set in Rule 11.1.1.2 b) of the Staff Rules, he appealed to the Appeal Board on 25 July 1989. In its report of 25 October the Board recommended rejecting his appeal, it was accordingly rejected, and he did not then pursue the matter.

In a letter of 26 August 1992 he asked the Secretary-General to pay him the salary he would have received in the first half of 1991 and from 1 January 1992 onwards had he kept grade G.7 and to restore the amount of his pension to at least the equivalent of what it would have been but for the change in his grade in 1984. The Secretary-General refused by a memorandum of 8 October. The complainant appealed to the Appeal Board on 20 October 1992 and, having got no reply, filed this complaint on 23 February 1993 against what he inferred as the rejection of his claim.

Meanwhile, in its report dated 19 February 1993, the Board had recommended no action by the Secretary-General for the time being though it expressed the view that the case might serve as an example of the failure of the United Nations system to ensure the fair treatment of staff promoted from the General Service to the Professional category.

B. The complainant observes that it was in 1989 that he first realised that because of a sharp fall in the value of the dollar against the Swiss franc the contributions he was paying to the Pension Fund were lower than they would have been had he not moved from grade G.7 to P.3 in 1984 and that his pension entitlements on retirement would suffer accordingly. The Appeal Board's comment on the appeal he lodged with it on 25 July 1989 was that it was irreceivable: it was too late because he had failed to challenge at the time the decision to promote him to P.3, and it was premature because he could do no more than make "conjectures" about the amount of his future pension. He explains that he is taking the matter up again because the amount of his pension is no longer a matter for conjecture.

The recent practice of the ITU is to protect the position of anyone in the General Service category who is put on a post in the Professional category by letting him opt to keep his present grade; but that does not help officials who changed categories before the decline of the dollar, and they are therefore being discriminated against. The consequences of such discrimination should be removed with retroactive effect.

Rule 3.4.2.3 b) of the ITU Staff Rules reads:

"Where promotion from the General Service category to the Professional category results in a decrease of a staff member's pensionable remuneration, he shall keep his pensionable remuneration at the level which it had reached

> immediately prior to the promotion until that level is exceeded as a result of advancement or further promotion."

That text was adopted when currencies were stable and the ITU is using it improperly for the purpose of systematic reduction in staff pay. The Union ought to have warned him that pay in the Professional category might prove volatile. He pleads breach of Regulation 3.15 of the ITU Staff Regulations, which reads:

> "Pensionable remuneration shall, without prejudice to the conditions of engagement of the staff member, consist of the amount calculated in accordance with the provisions of the Regulations of the United Nations Joint Staff Pension Fund."

In his submission the reduction in his pension, which is due to the reduction in his pensionable remuneration at grade P.3, constitutes - to quote that Regulation - "prejudice to [his] conditions of engagement".

He seeks the "adjustment" -

(a) of "salary and all other benefits" due after 30 September 1985 to "levels in harmony with the original intent of Staff Rule 3.4.2, i.e. by maintaining the salary difference in force during the first year of promotion until the end of the service period", such adjustment to "take into account the difference in hours worked by Professional staff in Geneva and New York";

(b) of "pension in accordance with Staff Regulation 3.15, taking into account the pension [he] would have obtained without promotion"; and

(c) of "all benefits for the last three years, up to and including retirement, on the basis of what would have been due" during that period if he had not been promoted.

C. In its reply the ITU submits that the complaint is irreceivable on two grounds.

First, the complainant did not include in his internal appeal the part of claim (a) above that he founds on "the difference in hours worked by Professional staff in Geneva and New York". To that extent he has failed to exhaust the internal means of redress and his present complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

Secondly, his claims to adjustment of salary are out of time and to that extent the complaint is again irreceivable. He knew full well long before 1992, and certainly no later than 25 July 1989 when he lodged his first internal appeal, that his salary at grade P.3 was lower than what it would have been had he still been at grade G.7.

In any event, says the Union, his complaint is devoid of merit. He founds his claims solely on the ITU's too narrow interpretation of Rule 3.4.2.3. In fact its reading of the text is sound. The rule applies only where the promotion, at the time at which it takes effect, brings about a reduction in the official's pensionable remuneration. In the complainant's case the material date was 1 October 1984, that of his promotion. Since the amount of his pensionable remuneration then actually increased, the rule did not come into play at all. Besides, it does not apply ad infinitum: if it did, the amounts of salary and pensionable remuneration would become acquired rights, and that is plainly untenable.

The complainant may not plead ignorance of the material rules. Rule 4.12 b) stipulates: "In accepting appointment the staff member shall state that he has been acquainted with and accepts the conditions laid down in these Staff Regulations and Staff Rules". Since the Regulations and Rules give in dollars the salary scales applicable to Professional category staff the complainant must have known the basis of reckoning his salary. Promotion is not a unilateral decision by the ITU: he accepted it of his own free will.

D. In his rejoinder the complainant enlarges on his original pleas and seeks to refute those put forward by the Union on the receivability and the merits of his complaint. He sets out in detail his objections to the Appeal Board's reasoning in its report of 19 February 1993. He denies that he realised long before 1992 that his salary at P.3 was lower than what it would have been at G.7 and that his case rests solely on the interpretation of Rule 3.4.2.3. He explains that what he wants is the correct interpretation of that rule as it was conceived at the time of its adoption, and he takes exception to the purely formal objections raised by the defendant.

CONSIDERATIONS:

1. The complainant, an official of the ITU, used to belong to the General Service category of staff. On 1 October 1984 he was transferred from a post graded G.7 to one in the Professional category that was graded P.3. As a result his status and his conditions of service changed and his salary, which till then had been denominated in Swiss francs, was stated in United States dollars.

2. On 26 August 1992 he wrote to the Secretary-General of the Union asking that his basic pay for the first half of 1991 and from 1 January 1992 on should match the higher amounts he would have obtained had he not been promoted; claiming recalculation of his pension so that it would "at least" match what he "would have obtained without promotion"; and contending that he ought to have been granted the "normally expected" increases in remuneration due on account of his advancement by two grades in the Professional category. On this last point he explained that the submission of the claims in his letter "in no way precludes any further claim" at a later date. In a memorandum dated 8 October 1992 the Secretary-General replied that he could not, for reasons he set out, allow the complainant's claims. On 20 October 1992 the complainant lodged an appeal with the ITU Appeal Board. In its report dated 19 February 1993 the Board "recommended no action to be taken by the Secretary-General at the present stage". On 23 February the complainant filed this complaint and his claims are summed up at the end of B above.

3. As to his claim to the adjustment of his salary and benefits after 30 September 1985 the Tribunal observes that he was aware as early as 1989 of the difference between his pay at grade G.7 and his pay at P.3. On 25 July of that year he lodged with the Appeal Board an appeal, which proved unsuccessful, about the interpretation of Rule 3.4.2. He took the matter no further at the time. The claim is clearly time-barred and therefore irreceivable under Article VII(2) of the Tribunal's Statute, which sets a time limit of ninety days for appealing against a final decision to the Tribunal.

4. In answer to his claim to the adjustment of his pension entitlements, all that need be said is that such entitlements depend on pensionable remuneration, which determines the amount of the contributions due from the staff member to the United Nations Joint Staff Pension Fund; that pensionable remuneration must be reckoned in accordance with the Regulations of the Fund; and that the complainant's contributions were correctly based on the pensionable remuneration corresponding to his P.3 grade. The claim is therefore devoid of merit.

5. He also claims the adjustment of "all benefits for the last three years, up to and including retirement, on the basis of what would have been due" if he had not been promoted. Insofar as that claim coincides with his claim to the adjustment of salary and benefits "after 30 September 1985" it is irreceivable for the reasons stated in 3 above; and insofar as it goes beyond that claim it is irreceivable under Article VII(1) of the Tribunal's Statute because he did not make it in the context of his internal appeal and has therefore failed to exhaust the internal means of redress.

6. Lastly, he has contended - though he does not make a formal claim to that effect in the complaint form - that he - ought to have been granted salary increments corresponding to advancement by two grades in the Professional category. But he has cited no provision of the Regulations or Rules which requires or even permits such adjustment of pay. Rule 3.4.2.3 does not help his case because it merely serves to determine new basic salary when a staff member moves from the General Service to the Professional category: once the new basic salary is established the rule has no further application.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas

William Douglas

Mark Fernando

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

AB Gardner

A.B. Gardner

SEVENTY-SIXTH SESSION

In re MORRIS (No. 2) Judgment 1323

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Robert Morris against the World Health Organization (WHO) on 15 December 1992 and corrected on 25 February 1993, the WHO's reply of 15 April, the complainant's rejoinder of 21 May and the Organization's surrejoinder of 23 June 1993;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal and WHO Staff Regulations 4.2 and 4.4, Staff Rules 1050 and Manual paragraph II.9.370;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant joined the staff of the WHO's Regional Office for the Americas in 1975. After a string of short appointments he was assigned to a project in Guyana in 1982 as a dental officer at grade P.4. On 31 December 1984 funding for the project ran out and the Organization released him under the rule on expiry of contract. That prompted his first complaint, on which the Tribunal ruled in Judgment 891 on 30 June 1988, ordering the WHO to apply the reduction-in-force procedure under Staff Rule 1050.2.

A reduction-in-force committee met in August and December 1988. It found a single post that might suit the complainant but took the view that he did not meet the language requirements. In an undated report it recommended granting him a terminal indemnity under Rule 1050.4 and "priority in consideration of re-employment for any vacancies which may occur during the next twelve months in preference to any external candidates". In a letter of 22 December 1988 the Director-General told him he had accepted the committee's recommendations.

Over the next twelve months the Organization announced two vacancies for dental officers, one at grade P.4 in the Oral Health Unit at headquarters in Geneva and one at P.5 in its Regional Office for Africa at Brazzaville. The complainant applied for both. The selection procedure having been delayed, the Director of Personnel told his counsel in a letter of

1 December 1989 that the period of his priority would be extended "until a selection had been made" for both posts.

By a letter of 27 February 1990 the acting Director of Personnel informed him that his application for the P.4 post had been unsuccessful because another candidate's "qualifications and experience were more suited to the job"; that the technical officer who had appraised his qualifications found he lacked necessary experience in "research, top level education and global international contact areas" and that was why he had not been chosen; and that as to the P.5 vacancy he still had priority.

In a message of 6 April 1990 the complainant's counsel asked the acting Director of Personnel to say who had been appointed to the P.4 post. In his reply of 3 May the Director said that it was "not the practice ... to disclose any information" on the candidates chosen.

On 8 May 1990 the complainant put his case to the headquarters Board of Appeal. In its report of 14 July 1992 the Board observed that the reduction-in-force committee had failed to consider him for the P.4 post at headquarters even though it had been created on 1 January 1988; that the Administration had impaired the secrecy of the selection committee's proceedings by divulging the technical officer's appraisal of him; and that criteria that officer had applied were at odds with the duties and qualifications listed in the notice of vacancy. Since the post was again vacant the Board recommended reconsidering him for it "without delay" and paying him 1,000 United States dollars towards costs.

In a letter of 16 September 1992 the Director-General told him that he found nothing wrong with the technical officer's appraisal of his suitability for the post nor any flaw in the procedure and that the post had been "established and approved" on 1 February 1989, not 1 January 1988. Though vacant the post had been "frozen" since 1 August 1991, and so he agreed to consider the complainant's candidature whenever it was "unfrozen". He also granted the complainant $250 in costs. That is the impugned decision.

B. The complainant relies on Manual paragraph II.9.370, which reads:

> "Staff members whose appointments are terminated by reduction in force whose service has been satisfactory and who wish to be considered for vacancies during the twelve months after their separation are considered for vacancies for which they are qualified in preference to any external candidates."

In his letter of 22 December 1988 the Director-General expressly gave him such priority until 22 December 1989. The WHO announced the P.4 vacancy at headquarters on 14 April 1989 and his qualifications and experience fitted the requirements set out in the notice. So the crucial issue is whether the Director-General appointed an external candidate.

The WHO has withheld that information from him and from the Board of Appeal on the grounds of the secrecy of the selection procedure. But why should the successful candidate's colleagues know who he is and where he came from but not the Board? Under the circumstances it must be assumed that the Organization gave preference to an external candidate.

The complainant seeks retroactive appointment to the post, moral damages and costs.

C. In its reply the WHO owns to taking an external candidate and submits that that was lawful. Priority under Manual paragraph II.9.370 is neither absolute nor applicable to all vacancies in the areas where a candidate with priority has worked. The paramount consideration, as laid down in Staff Regulation 4.2, is to secure the highest standards of efficiency, competence and integrity.

The Director-General endorsed the selection committee's view that another candidate was better qualified than the complainant. His decision being discretionary, he is not under any duty to justify it. Besides, the acting Director of Personnel explained the complainant's shortcomings in the letter of 27 February 1990. His appointment would have been "automatic" only if his qualifications had been satisfactory and at least on a par with those of the other candidates. The technical officer's appraisal of him did not, as the Board of Appeal found, introduce criteria that were not in the notice of vacancy: it merely stated in so many words the level of qualification which the announced requirements implied.

Since the Tribunal may not assess candidates it will not determine whether the complainant's own view of his qualifications is sounder than the Director-General's. In any event disclosing selection committee's reports would limit their members' freedom to discuss the candidates' merits.

D. In his rejoinder the complainant objects to the construction the WHO puts on Regulation 4.2: if the requirement of meeting the highest standards of efficiency, competence and integrity were absolute, geographical distribution could not weigh as heavily as it should. The purpose of Manual paragraph II.9.370 being to safeguard employment, reducing priority to a criterion for breaking the tie between two otherwise equal candidates would frustrate its intent.

As to qualifications, the complainant had only to be good enough to do the job competently, not equal to or better than the external candidate. Insofar as the complainant meets the announced requirements for the post the WHO's case turns on an excerpt from the technical officer's evaluation of him, which the Board of Appeal has declared invalid. In the absence of the selection committee's report the complainant should get the benefit of the doubt.

Since the Director-General refuses to substantiate his decision there is no telling whether he regarded the complainant as unfit for the post or merely less qualified than the successful candidate. The Organization is wrong to suggest that utterly free discussion in the selection committee must take precedence over due process: that the report of a selection committee may go to an appeals body must not preclude sound selection.

E. In its surrejoinder the WHO answers the complainant's objections in the rejoinder and observes in particular that geographical considerations do not outweigh its paramount concern for high standards of competence and integrity. Selection is an administrative, not a judicial process and would be hampered if any disgruntled candidate had access to a selection committee's report and could challenge it if he saw fit. Only evidence of a fundamental flaw in the process warrants producing such information and in this case there is none.

CONSIDERATIONS:

1. In Judgment 891 of 30 June 1988 the Tribunal ordered the WHO to apply to the complainant the reduction-in-force procedure prescribed in Staff Rule 1050.2. The reduction-in-force committee that the WHO accordingly set up found only one post to which the procedure might be applied and concluded that the complainant failed to meet the language requirements of that post. It therefore recommended paying him an indemnity in accordance with Rule 1050.4 and giving him "priority in consideration of re-employment for any vacancies which may occur during the next twelve months in preference to any external candidates". Manual paragraph II.9.370, which is reproduced in B above, provides indeed for such preference. By a letter of 22 December 1988 the Director-General informed the complainant that he accepted the committee's recommendations.

2. On 14 April 1989 the Organization announced a vacancy for a dental officer at grade P.4 in its Oral Health Unit at headquarters in Geneva. The complainant applied for the post. By a letter of 27 February 1990 the acting Director of Personnel told him that his application had been "given full consideration" but that "another candidate whose qualifications and experience were more suited to the job was selected". The acting Director went on to explain that the "reasons for [his] non-selection as per the appraisal of the responsible technical officer" were that his background was unsuitable for the post "in the research, top level education and global international contact areas" and he had "no experience in more advanced research and education or in preventive methodology development".

3. In ensuing correspondence with the complainant's counsel the Director of Personnel refused to disclose, even for the purpose of appeal, any particulars about the successful candidate. Eventually, but not until it filed its reply to the present complaint, the Organization revealed that that candidate had been an external one.

4. The complainant filed an appeal with the headquarters Board of Appeal on 8 May 1990 against the decision not to select him for the P.4 post. In its report of 14 July 1992 the Board held that the technical officer's appraisal of the complainant had not been in conformity with the "Guidelines for the selection of candidates for Professional posts and the preparation of submissions to headquarters selection committees". Point 6 of those guidelines read:

> "... care should be taken to use only selection criteria which are specifically mentioned in the vacancy notice; additional requirements added _post facto_, particularly if used to justify the selection of a specific candidate, may not be introduced in your submission."

The Board took the view that the technical officer's "submission" to the selection committee which had made the recommendation for filling the P.4 post had not been "consistent with the duties and qualifications mentioned in the vacancy notice" and it concluded that "the established selection procedures were not fully adhered to". It recommended reconsidering the complainant "without delay" for the post, which by then had again fallen vacant, and awarding him 1,000 dollars in costs.

5. In a letter of 16 September 1992 the Director-General informed the complainant that he disagreed with the Board's conclusion about the technical officer's appraisal, though he gave no reasons for doing so. He accepted the recommendation for reconsidering the complainant for the post but said that it

had been "frozen" since 1 August 1991 and he would be given "due consideration alongside other qualified candidates when the post is unfrozen". He granted $250 in costs. The complainant is now impugning that decision and seeks retroactive appointment to the post and awards of moral damages and costs.

6. The WHO argued before the Board that though the complainant was "a highly qualified Dental Officer" he "did not meet the standards required for the position". But the Organization may not now properly deny that he had the required qualifications for the P.4 post he had applied for: the impugned decision recognises as much, otherwise the Director-General could not have assured the complainant that he would be considered for the post along with "other" qualified candidates.

7. The Organization contends that he was entitled to preference over an external candidate, not as a matter of course, but only if his qualifications were just as good, and that the external candidate was better qualified than he. It relies on Regulation 4.2:

> "The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. ..."

8. The Organization offered no evidence to the Board of the external candidate's qualifications and on the grounds of privilege it has vouchsafed no information on that score to the Tribunal either. It relies on a memorandum which the Director-General addressed on 28 March 1983 to the Chairman of the headquarters Board of Appeal and in particular on the following passage:

> "In future, in order to protect the indispensable confidentiality of selection documentation, the contents of ... Selection Committee papers shall be disclosed neither to staff members who have applied for a vacancy notice, nor to the Ombudsman, nor to Appeal Boards. ... members of Selection Committees should be free ... to state their views frankly and without constraint so that the most qualified and best candidate is selected. They must therefore feel assured that their views are expressed, recorded and protected as privileged material. Full confidentiality of such internal documentation and discussions must also be guaranteed in order to protect the interests of third parties, i.e. other candidates for the vacancy."

9. The Tribunal does not accept that the disclosure of a candidate's identity and qualifications may be properly

regarded as likely in any way to inhibit the free expression of views by members of selection committees or to prejudice the interests of other candidates. In this case the external candidate's qualifications were of essential importance to the selection committee in making its choice and to any appeal against the appointment made. As was held in Judgment 1177 (in re Der Hovsépian), an item that forms part of the proceedings that led to the impugned decision may not be withheld from the Tribunal's scrutiny. The Organization's plea under this head fails because of the utter lack of evidence to suggest that the external candidate was better qualified than the complainant.

10. In any event, even on the assumption that the external candidate was better qualified, the Organization is misconstruing Manual paragraph II.9.370. The principle that is set out in the passage from Regulation 4.2 above is not absolute but is subject to the following express qualifications in 4.2 in fine and in 4.4:

> "4.2 ... Due regard shall be paid to the importance of recruiting and maintaining the staff on as wide a geographical basis as possible."

> "4.4 Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organization in preference to persons from outside. This preference shall also be applied, on a reciprocal basis, to the United Nations and specialized agencies brought into relationship with the United Nations."

Moreover, the particular rule in Manual paragraph II.9.370 is not in conflict with the general provision in Regulation 4.2. That Manual paragraph and the Director-General's decision of 22 December 1988 entitled the complainant to preference over "any" external candidates, not just over less well qualified, or equally qualified, external candidates. The reasons why it is proper to grant such preference to serving and former employees over candidates from outside were stated in Judgment 133 (in re Hermann):

> "... it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the

> qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment."

11. The Tribunal will not send the case back for the Director-General to consider whether to give the complainant an appointment. The P.4 post is, it appears, still frozen, and it is not known when it or any other suitable post may become available. The complainant served the Organization for only just over nine years, there has been a similar lapse of time since his post was abolished, and he does not even give any information about loss of earnings since leaving the Organization. In the circumstances the Tribunal decides, in accordance with Article VIII of its Statute, to award him damages for all forms of injury and it sets the amount at 30,000 United States dollars. It also awards him $5,000 in costs.

DECISION:

For the above reasons,

1. The Organization shall pay the complainant 30,000 United States dollars in damages for material and moral injury.

2. It shall pay him $5,000 in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas

William Douglas

Mark Fernando

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. Gardner

A.B. Gardner

SEVENTY-SIXTH SESSION

In re RIVERO Judgment 1324

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Carlos Gabriel Rivero against the European Patent Organisation (EPO) on 22 April 1993, the EPO's reply of 9 July, the complainant's rejoinder of 19 August and the Organisation's surrejoinder of 27 September 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 8(a), 60 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and EPO circulars 22 of 16 January 1979 and 197 of 20 December 1990;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 60 of the EPO's Service Regulations, as amended by its Administrative Council on 7 December 1990 as from 1 July 1990, reads:

> "Home leave
>
> (1) Permanent employees who are nationals of a country other than the country in which they are employed shall receive eight working days' additional leave every two years to return home. Travel expenses for such leave shall be reimbursed ...
>
> (2) For the purposes of these Regulations, the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up his duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.
>
> Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

The complainant, who is a citizen both of Argentina and Italy, was born at Dolores, in the Province of Buenos Aires, Argentina, in 1962 and lived there until he was 24. He joined the staff of the EPO on 2 April 1990 as a patent examiner in Directorate General 1 at The Hague. The offer of employment, which was dated 7 December 1989 and which he accepted in a telex of 21 December, made appointment conditional on his showing that he had Italian nationality and stated that his "home" under Article 60 would be Rome.

In a letter of 7 February 1990 he informed the recruitment officer that in the "first few months" he spent in the Netherlands his "fiancée" would be living with him as his dependant; she was, he said, "a lawyer, Italian citizen". They married on 14 December 1990.

By circular 197 of 20 December 1990 the EPO informed staff of new arrangements regarding home leave and expatriation allowance and asked any staff who thought they might be affected to submit evidence of nationality and state what they regarded as "home" within the meaning of Article 60 as amended from 1 July 1990.

In a letter of 14 August 1991 the complainant asked the President of the Office to change his home from Rome to Buenos Aires on the grounds that he had been born and brought up in Argentina, that his family and his wife's lived there and that they were both citizens of that country. On behalf of the Head of the Personnel Department a personnel officer refused his application in a note of 5 September 1991 for want of change in his personal situation since recruitment: according to the rules, including circular 22 of 16 January 1979, home was generally meant to be in a "Contracting State" and the EPO had recruited him as a citizen of such a country, Italy.

In a note to the President dated 18 September 1991 the complainant pressed his claim, maintaining that his marriage had changed his personal situation since he had joined the staff and that the country he had the "closest connection" with outside that of his duty station was Argentina.

In a letter of 17 October the Principal Director of Administration told him that the President was "not prepared" to change his home.

On 29 November 1991 he lodged an appeal under Article 108 of the Regulations. In its report of 18 September 1992 the Appeals Committee unanimously recommended allowing the appeal. But in a letter of 8 January 1993, the impugned decision, the Director of Staff Policy told the complainant that the President saw no grounds for review.

B. The complainant submits that he is entitled under the EPO's new policy on home leave to have his home changed from Rome to Dolores, in the Province of Buenos Aires. Article 60(2) of the Service Regulations empowers the President to change the place of home whenever the reasons an official gives so warrant. Though Article 60(2) treats review as a "special decision" it is called "special" only because it may come after the employee has taken up duty, not because it requires "exceptional" circumstances.

When the EPO originally designated his home it committed a mistake of law. As the Tribunal held in Judgment 525 (in re Hakin No. 5), what Article 60 requires is that the official's home be in the country where he has the "closest connection", where his family is living, where he was brought up and where he possesses property. Contrary to what a recruitment officer led him to believe on 2 April 1990, home need not be in a member State.

He also alleges that the President's refusal to change his home overlooked essential facts. Nine months after his appointment he married a fellow citizen of Argentina who acquired Italian nationality too at the age of 27. His links with Argentina, where his own and his wife's family live, have grown even stronger since the birth of their two children and since 1986 he has been spending at least seven weeks a year there.

By allowing him and his family home leave only in a country where they have no special ties, own no property and have no close relatives, the EPO is also in breach of the duty of care it owes its staff.

Since the EPO brought in its present policy on home leave "home" is no longer restricted to member States. By letting other staff take home leave in non-member States and refusing to let the complainant do so the EPO has offended against equal treatment.

He seeks the quashing of the President's decision of 8 January 1993 and the designation of Dolores in the Province of Buenos Aires as his home. He also claims 7,000 guilders in costs.

C. In its reply the EPO contends that the complaint is devoid of merit. Under Article 8(a) of the Service Regulations candidates for appointment as permanent employees must be a national of one of the "Contracting States, unless an exception is authorised by the appointing authority". But there was no exception in the complainant's case: his recruitment was part of a campaign to increase the number of Italian examiners for the sake of more even geographical distribution of staff between member States. He agreed in December 1989 to taking home leave in Rome and his objections to the original decision are time-barred.

On the merits the Organisation submits that the President will, in the exercise of his wide discretion, review the designation of an official's home only in exceptional cases, when there has been a radical change in the employee's personal circumstances. The complainant told the Administration in his letter of 7 February 1990 that he had an Italian "fiancée". Inasmuch as engagements between Italians imply a "serious intention to marry" his marriage is not so great a change as to warrant review.

The defendant denies breach of its duty of care to him: it was he who abused the Organisation's good faith by stressing his wife's Italian nationality and accepting Rome as his home.

The amendment of Article 60 with effect from July 1990 has not altered the list of countries in which home leave may be taken: the usual place has always been in the Contracting State of which the official is a citizen.

As to the alleged breach of equal treatment the cases he cites were different in fact and in law from the complainant's.

D. In his rejoinder the complainant enlarges on his original arguments. Insofar as he does not claim retroactive effect for the change of his home he is plainly not challenging the original decision: what he wants is review of that decision. In February 1990 he had no intention of marrying and therefore had no reason at the time to mention his future wife's other nationality. Citing cases where the Administration refused to recognise an official's home because it was not in a member State, he contends that it was only after the issue of circular 197 that it began to authorise the taking of home leave in non-member States.

E. In its surrejoinder the EPO says that the rejoinder contains nothing to make it alter its stand. It comments on the issues raised, observing in particular that the changes the complainant mentions in other officials' homes have no bearing on this case since they involved employees whose home was in the country of employment and who could not have them elsewhere before the revised version of Article 60(1) came into force. In any event the circumstances the complainant relies on either existed before he was recruited - and he has only himself to blame for not raising them in good time - or were, like his marriage, easy to foresee.

CONSIDERATIONS:

1. The complainant seeks the quashing of the decision that the President of the European Patent Office took on 8 January 1993 rejecting his application for the change of his "designated home" from Rome to Dolores, in the Province of Buenos Aires. The material rules on home leave for EPO staff are in Article 60 of the Service Regulations and are reproduced in A above. The President gave two reasons for rejection of the complainant's claim. One was that the amendment of Article 60 of the EPO's Service Regulations as from 1 July 1990, notified to the staff by circular 197 of 20 December 1990, did not affect the procedure for review of a permanent employee's designated home; and the second reason was that the changes that had occurred in the complainant's personal circumstances since joining the staff did not warrant any change in his designated home.

2. One preliminary point is that, short of formally pleading that the complaint is irreceivable, the Organisation observes in its reply that the complainant made his claim too late and that he has therefore "lost his chance to assert the circumstances which he belatedly puts forward in support of his request for review". Yet it acknowledges in the same brief:

> "His internal appeal ... lodged on 29 November 1991 would, if it had been aimed expressly at the original designation of the place of home leave [in Rome], have been irreceivable due to lateness. On the other hand, it was receivable insofar as it was aimed expressly and exclusively at the 'change' in the place of home leave ... as any permanent employee is free to lodge a request for review at any time if circumstances justify it."

What the complainant is seeking from the Tribunal is an order "that, for the purposes of Article 60(2) [of the Service Regulations], my designated 'home' be reviewed". In other words he is claiming a change in his designated home; on the defendant's own admission that claim is receivable; and his pleas on the merits are taken up below.

3. The complainant pleads breach of equal treatment in that the Organisation has granted home leave in Argentina to a staff member who has the nationality both of Germany and of that country, yet has denied it to him, a citizen of Argentina and Italy. Again, a new employee of Canadian and Italian nationality has been allowed to take home leave in Canada. And new employees who are citizens of Argentina as well as some

other country and who have their true "homes" in Argentina have automatically had "home" designated there. In the complainant's submission the decisions taken in those cases are attributable to a change in the EPO's policy which came in after its Administrative Council amended paragraph 1 of Article 60 as from 1 July 1990. He contends that the new policy allows staff with dual nationality to change their designated home, where circumstances so warrant, to a place outside the territory of EPO member States. He points out that the text of 60(1) as in force since 1 July 1990 grants home leave to "permanent employees who are nationals of a country other than the country in which they are employed", whereas the previous text granted such leave only to a permanent employee who was entitled to the expatriation allowance and who was not a national of the country of his employment.

4. The EPO demurs. As to the supposed change of policy, it argues that the amendment to Article 60 did not affect the rules on review of the official's "home" but "concerned the initial determination of the place of home leave only". It goes on: "... the place of home leave continues as before to be normally situated on the territory of the Contracting State of which the employee is a national, unless circumstances justify the choice of another State". In answer to the complainant's charge of breach of equal treatment the Organisation contends that the cases he cites are irrelevant because they "differ legally and factually" from his. The citizen of both Argentina and Germany was not entitled to home leave before the amendment of Article 60 because he had the nationality of his country of employment; unlike the complainant's, his was a case of original designation, not review of home. As for the Italian-Canadian staff member, he had his home designated in Italy on recruitment, but he showed special reasons warranting a change in home. The Organisation further argues that "there can be no question of the automatic designation of Argentina" as the home of "new employees who have Argentinian nationality as well".

5. In Judgment 525 (in re Hakin No. 5), which was also about a claim by an EPO employee to review of home under Article 60(2), the Tribunal declared such review to be "an exceptional measure". It held, in 4:

> "The President has discretion in the matter, and accordingly the Tribunal will quash his decision only if it was taken without authority, or if it was tainted with a procedural or formal defect, or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence."

6. The impugned decision in this case rests on a mistake of law, and the mistake lies in misinterpretation of the principle of equal treatment.

7. In Judgment 1194 (in re Vollering) the Tribunal stated that principle in the following terms:

> "The case law says that for there to be breach of equal treatment there must be different treatment of staff members who are in the same position in fact and in law. In other words, equal treatment means that like facts require like treatment in law and different facts allow of different treatment. It follows that treatment may vary provided that it is a logical and reasonable outcome of the circumstances."

So is the complainant's situation legally and factually different from that of the other employees with dual nationality that he cites?

8. The EPO says that it is. In all those other cases but one the President of the Office was making the original designation of home whereas here the decision concerns review of the designation already made. Only in the case of the staff member with Canadian and Italian citizenship did the President find that the special circumstances which he was relying on were sufficiently cogent for him to allow the change.

9. The Organisation's plea on that score fails because there is no difference in substance between the original designation and the review of "home". In both cases the purport of the President's decision is the same: to determine the place where the employee may take home leave, and the original designation and the review cannot properly be made according to different criteria. It would offend against the principle of equal treatment the recruit who has strong ties with the country of one of two nationalities should get the automatic designation of a place in that country as "home", while in identical circumstances another employee is refused designation of his home in that country simply because he is seeking review of a determination already made. Since the distinction does not hold up in law, the impugned decision cannot stand.

10. The question accordingly arises whether the complainant's circumstances warrant the change he seeks in the designation of his home under Article 60 of the Service Regulations. According to paragraph 2 of that article "the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed", and the Organisation must take into account "the place of residence of the employee's family, where he was brought up and any place where he possesses property".

11. The Tribunal is satisfied on the evidence before it that the country with which the complainant has the "closest connection" is Argentina. He was born in that country and did not acquire Italian citizenship, by ius sanguinis, until 1986, when he was already 24 years old. He had primary, secondary and university education in Argentina and did only post-graduate studies in Rome. His parents, grandparents and other relatives live there. His wife is also a citizen of Argentina as well as Italy and has spent the greater part of her life in Argentina. They married in that country in 1990. Since coming to Europe the complainant says - and the EPO does not deny - he has travelled regularly to Argentina and spent seven weeks a year there.

12. The conclusion is that the complainant qualifies for review of the determination of his home under the second paragraph of Article 60(2) of the Service Regulations, and his home must be changed accordingly.

13. Since his claim succeeds he is entitled to an award of costs, and the amount is set at 3,000 guilders.

DECISION:

For the above reasons,

1. The President's decision of 8 January 1993 is quashed.
2. The complainant's designated home shall be changed from Rome to Dolores in the Province of Buenos Aires in Argentina.
3. The Organisation shall pay him 3,000 guilders in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

Wm Douglas

William Douglas

E. Razafindralambo

AB Gardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION ADMINISTRATIVE TRIBUNAL GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re EL MAHJOUB (No. 2) Judgment 1325

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Mohamed El Mahjoub against the International Labour Organisation (ILO) on 19 April 1993, the ILO's reply of 22 July, the complainant's rejoinder of 25 August and the ILO's surrejoinder of 28 October 1993;

Considering Articles II, paragraph 1, and VII, paragraphs 2 and 3, of the Statute of the Tribunal and Articles 4.6 and 13.2 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Libyan citizen born in 1936, joined the staff of the ILO in Geneva in 1985. His career ended on 31 December 1991 in the circumstances described under A in Judgment 1213 of 10 February 1993, which dismissed his first complaint.

Before his appointment ended he went on sick leave from 12 December 1991. On 2 March 1992 he turned up at the office. In the meantime, on 19 February 1992, he had submitted an internal "complaint" to the Director-General under Article 13.2 of the Staff Regulations of the International Labour Office alleging wrongful termination of employment. In a letter dated 18 June 1992 the Director of the Personnel Department rejected his "complaint" on the Director-General's behalf.

On 10 December 1992 he submitted another "complaint" to the Director-General requesting payment of salary since 1 January 1992. By a letter of 28 January 1993 the Director of the Personnel Department informed the complainant, on the Director-General's behalf, that no salary had been paid since the beginning of the year because his contract had expired on 31 December 1991 and that his complaint was time-barred. That is the decision he is impugning.

B. The complainant maintains the pleas he put forward in support of his first complaint. He observes that after joining the ILO his appointment was extended by less than a year at a time; indeed in 1991 he was granted four extensions, three of them for a mere two months each. That, he submits, was in breach of Article 4.6 of the Staff Regulations ("appointments for a fixed term shall be of not less than one year and of not more than five years") and of ILO practice and denied him benefits he would have had under an appointment without limit of time.

The post which - as is recounted in Judgment 1213 under A - the ILO offered him at Tunis was temporary, and the Organisation failed to explain the grounds for such transfer.

He was not treated on a par with others: the previous holder of the Tunis post had been promoted to P.5, and three other officials were granted fixed-term appointments as regional advisers on labour administration in Africa and the Arab States. He has been victimised.

The complainant further observes that for no valid reason the ILO stopped his salary in January 1992, while he was on sick leave, so as to force him out of his job.

He asks the Tribunal to quash the "unlawful actions" blocking his salary from January 1992 and order that he be allowed to perform his duties. He seeks an award of material damages in an amount corresponding to his "salaries" for the period from 1 January 1992 up to the date of his reinstatement and, "for the period subsequent to the date of the Tribunal's judgment", in an amount that takes account of the salary he would have been paid had he been kept on until retirement.

C. In its reply the ILO submits that the Tribunal already dismissed his claims in Judgment 1213 on his first complaint. His pleas are nearly all a rehash of his objections to the lawfulness of the proposed transfer to Tunis. So his complaint is irreceivable under the res judicata rule.

Though his challenge to the decision not to extend his appointment may be something new, his complaint is still irreceivable under Article VII(2) of the Statute of the Tribunal because he failed to file it during the ninety days after the notice of the final decision he got in the letter of 18 June 1992. The letter of 28 January 1993, which he impugns, merely confirmed the earlier decision.

D. The complainant presses his case in his rejoinder. He contends that res judicata cannot apply because this case is the outcome of facts subsequent to Judgment 1213, namely his internal "complaint" of 10 December 1992 and the Organisation's reply of 28 January 1993.

His answer to the ILO's other plea is that its letter of 18 June 1992 was "irreceivable and nil": he lodged his internal "complaint" on 15 February 1992; Article VII(3) of the Statute's Tribunal does not allow the Organisation to remain silent for more than sixty days; and it missed that deadline. So its final decision is not that letter, but the one of 28 January 1993, and he filed this complaint in time.

E. In its surrejoinder the Organisation contends that the complainant's rejoinder raises no new issue but is merely an attempt to state the same pleas more clearly. It presses its objections to the receivability of his arguments about his proposed transfer to Tunis, a matter that is res judicata, and about non-renewal. His rejoinder betrays a misunderstanding of the term "irreceivable" and of Article VII(3) of the Tribunal's Statute. Having failed to take his case to the Tribunal within the prescribed time limit, he may not go on lodging internal appeals under Article 13.2 of the Staff Regulations in the hope that the Organisation's reply will open the way for further action before the Tribunal.

CONSIDERATIONS:

1. The complainant joined the ILO in January 1985 under a one-year fixed-term contract at grade P.4. He got several extensions. As Judgment 1213 recounts in A, the Organisation offered him transfer to Tunis in 1991 under a two-year appointment at the same grade but with payment of a special post allowance at grade P.5. After some discussion the Organisation decided that he should take up duty on 1 November 1991. Though he did not object to the transfer as such, he wanted an appointment without limit of time at grade P.5.

2. Since the ILO regarded the conditions he raised as tantamount to rejection of its offer it decided not to extend his appointment beyond 31 December 1991. On 17 January 1992 he filed his first complaint, which gave rise to Judgment 1213. The Tribunal held that the complainant's conditions were not warranted and that it was proper to treat them as refusal of transfer.

3. After 1 January 1992, although he made attempts to resume work, the Organisation did not let him, nor did it pay his salary. It rejected several protests he made on the grounds that he had not been dismissed but his contract had simply expired and that his grievances were the same as those he had already put in his first complaint.

4. In this complaint he is alleging that the Organisation unlawfully froze his salary from January 1992, that it forced him out of his office in July/August 1992 and that its motive for doing so was a desire to end his employment, and he is claiming reinstatement and material damages.

5. The decision not to renew the complainant's contract was the direct consequence of his refusal of transfer to Tunis and so he has only himself to blame for it. His complaint being devoid of merit, there is no need to rule on the Organisation's objections to receivability and his claims therefore fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

Wm Douglas

William Douglas

E. Razafindralambo

Mark Fernando

ABGardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL
TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re GAUTREY

Judgment 1326

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Michael Leslie Howard Gautrey against the International Telecommunication Union (ITU) on 15 January 1993, the Union's reply of 24 May, the complainant's rejoinder of 6 September and the ITU's surrejoinder of 14 October 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Regulation 9.6 and Rule 11.1.1 of the ITU Staff Regulations and Staff Rules, Articles 8(a) and 8(c) of the Inter-Organization Agreement concerning transfer, secondment or loan of staff among the organizations applying the United Nations Common System of Salaries and Allowances (Document ACC/1982/PER/CM/24) and Article 11.6 of the Staff Regulations of the International Labour Office;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British, joined the staff of the ITU in April 1986 on transfer from the Food and Agriculture Organization of the United Nations under the Inter-Organization Agreement concerning transfer, secondment or loan of staff among the organizations applying the United Nations Common System of Salaries and Allowances (Document ACC/1982/PER/CM/24). He was put on a post as English editor at grade P.3 with the International Frequency Registration Board. He got a permanent appointment in April 1988.

On 23 February 1990 his supervisor informed him orally that his post was to be abolished in the spring of that year and that, no other suitable post being available, the ITU would be terminating his appointment. But the Chief of the Personnel and Social Protection Department would - it was understood - help him to find a job in another organisation.

On 8 March the Chief of Personnel confirmed what his supervisor had already said. In a later conversation he told him that his entitlements, taking account of his seniority in the United Nations system, came to some 90,000 Swiss francs, including repatriation grant and termination indemnity, which the Secretary-General of the Union had decided - as Regulation 9.6 d) allows - to increase by 50 per cent. At those meetings the complainant says he asked whether, if he found a fixed-term appointment in another organisation by 1 January 1991, the ITU would baulk at paying him the termination indemnity when he left or at least preserve his entitlement until he got a permanent job; he says that the Chief of Personnel agreed to look into the matter.

On 3 July 1990 he was chosen for a post at the International Labour Office (ILO) and on 4 September accepted the ILO's offer of an appointment for two years starting on 2 September.

On 4 September he wrote to the ITU's Secretary-General to say that he had not yet got any answer to his question about his termination indemnity and that signing the contract with the ILO did not mean that he was waiving his entitlements under his appointment with the ITU.

By a letter of 13 September 1990 the Chief of Personnel told him that because of the special circumstances and although there was no such requirement in the ITU's Staff Regulations or the 1982 Inter-Organization Agreement, the Secretary-General had taken "the quite exceptional decision" to maintain for two years as from 2 September 1990 his entitlement to termination indemnity under Regulation 9.6 on the following terms: if the ILO ended his appointment before 2 September 1992 and he found no other job, the ITU would make up the termination indemnity from the ILO with the amount that would have been due to him in United States dollars at 31 December 1990; if he was unemployed at the end of his two-year appointment it would pay him the indemnity in full.

By a letter of 25 October 1990 he asked the Secretary-General in accordance with Rule 11.1.1.2 a) to reconsider the decision of 13 September on the grounds that he ought to get the termination indemnity on leaving the Union and that if the ILO did not give him a permanent appointment the amount should be reckoned as at the date of expiry of his contract with the ILO.

By a letter of 29 November 1990 the Secretary-General turned down his request: he was not covered by Regulation 9.6 since he had not been "dismissed from the ITU then appointed by the ILO" but "transferred from the ITU to the ILO", and the decision to maintain his entitlement had gone "beyond any obligation in the rules or contract".

On 11 December 1990 he applied to the Secretary-General for leave to bypass the internal appeals procedure and take his complaint against the decision of 29 November straight to the Tribunal. The Secretary-General refused in a letter of 10 January 1991.

On 20 February 1991 he lodged an internal "complaint" with the Appeal Board against the decision of 29 November 1990. He claimed payment of the indemnity due from the ITU as at 1 September 1990 plus interest at the rate of 10 per cent a year as from the same date - unless the ITU preserved his entitlement until he got a permanent appointment with the ILO. If he got no such permanent appointment the amount of the indemnity should be reckoned as at the date of the expiry or termination of his fixed-term appointment with the ILO.

In its report of 2 August 1991 the Appeal Board observed that in no circumstances would he get less than the amount he would be entitled to if termination indemnity became due either within or upon expiry of his two-year contract with the ILO or if the ILO employed him further, but it regretted that the ITU had failed to inform him that in the latter contingency his acquired rights would be maintained by the ILO and it suggested giving him an assurance on that score.

By a memorandum of 7 October 1991 to the chairman of the Board the Secretary-General endorsed the report but with two reservations: he felt unable to endorse the Board's statement that the complainant would not receive less than what he would be entitled to if the ILO gave him an extension of contract; and since the ITU's commitment to maintaining his entitlement was made ex gratia he had no acquired rights at all.

In an "amendment" of 19 October 1992 to its report the Board said that the ITU had acted in accordance with the rules; that, the two-year commitment having expired, the ITU was no longer liable towards the complainant; that if the ILO gave him any further fixed-term appointments the only material rules on termination would be the ones in the ILO Staff Regulations; and that there was no evidence of breach of acquired rights.

In a letter of 21 October 1992 - the impugned decision - the Secretary-General told him that the amendment to the Board's report concluded the internal appeals proceedings which his letter of 25 October 1990 had started, and his claims in that letter were rejected.

B. The complainant has three pleas.

First, the impugned decision was unlawful because the Appeal Board was not properly constituted. The Secretary-General appointed a new Board on 1 September 1992 by

Decision 7634. According to an opinion given by the Union's legal adviser on 9 November 1992 the former Board members should hear appeals received by 1 September 1992. So the former members should have written the amendment to the report; they did not, since the staff representative, for one, had been replaced.

Secondly, the Union failed to respect his entitlement to termination indemnity. According to Regulation 9.6 a) it must pay such indemnity to "staff members whose appointments are terminated because of abolition of the post or reduction of the staff". If the complainant had not been transferred from the ITU to the ILO and if he had awaited the end of his appointment before looking for a new job, the Union would have dismissed him on the grounds of abolition of post. The transfer was no reason to exclude him from entitlement under Regulation 9.6; he was entitled to compensation for breach of a fundamental term of employment, namely the security of permanent appointment. All that he agreed to was that instead of paying the indemnity at the end of his appointment the ITU should preserve it until he got a permanent contract with another organisation. Had he been given the choice he would have stayed on at the ITU.

He objects to the Secretary-General's decision of 13 September 1990 to maintain his entitlement only until 2 September 1992. He is now subject to Article 11.6 of the ILO Staff Regulations, which does not prescribe the payment of termination indemnity for non-renewal of fixed-term appointments. As for the amount of the indemnity, it should be reckoned as at the date of separation from the ILO if it did not offer him an indefinite appointment.

Thirdly, the Union was in breach of its duty of good faith. Almost two years went by between his request for review and the Secretary-General's final answer, which came after a lapse of the two years in which the Union guaranteed payment of the indemnity.

The complainant seeks (1) the quashing of the Secretary-General's decision of 21 October 1992; (2) payment of the termination indemnity in the amount due at 1 September 1990 plus interest at the rate of 10 per cent a year as from the same date, unless the Union guarantees the entitlement until the ILO offers him a permanent contract; failing such a contract, the amount of the indemnity should be reckoned as at the date on which a fixed-term contract with the ILO expires or is terminated; (3) moral damages for the undue delay in reviewing his case; and (4) 89,500 French francs in costs.

C. In its reply the Union states that the ILO's offer was the outcome of joint efforts by its Chief of Personnel and the complainant. The ITU did its utmost to let him stay on in the common system. It did not dismiss him; so he may not claim entitlement under Regulation 9.6. Although there was termination of its contract with him within the meaning of paragraph 8(a) of the Inter-Organization Agreement, only termination of contractual links with the international civil service, which he has failed to establish, confers entitlement to the indemnity. Besides, since his transfer he has been covered by the ILO's rules on fixed-term contracts, under which, in cases like his, full service with the common system counts in reckoning the indemnity.

The Union denies breach of entitlement to termination indemnity. It decided to preserve his entitlement for two years because it knew that the ILO would be unable to comply with paragraph 8(c) of the Inter-Organization Agreement, under which:

> "... the receiving organization will, if it is possible to do so in accordance with its normal policies, grant him an appointment of duration not less than that of his appointment in the releasing organization."

The ITU had no duty under rules or contract to do so.

It was not in breach of good faith, though it regrets the time that the appeal took. The legal adviser's intent was respected in constituting the Appeal Board. It was because members who should have sat declined to do so that exceptional arrangements had to be made, and they caused the complainant no injury anyway.

D. In his rejoinder the complainant maintains that the appeal procedure was flawed because the composition of the Appeal Board was not in keeping with the legal adviser's opinion of 9 November 1992, which was that "any appeal received by 1 September 1992, whatever the stage the proceedings might have reached, must be heard by the Board as constituted prior to that date, that Decision 7634 of 1 September 1992 was "clear and needs no interpretation"; and that "any other approach might prompt challenge from appellants on such grounds as that the Board's membership has been so changed as to harm their case". The complainant points out that the Board's report of 2 August 1991 was in his favour, and he submits that the conclusions of the amendment thereto would have been different had the Board been properly constituted.

Though he did get a transfer, the ITU was bound to make good the loss of security in law he suffered in the termination of his permanent appointment. Payment of the indemnity is not subject to termination of contractual links with the international civil service, a concept he is unaware of. In any event the continuity of that relationship has not been established since he has no guarantee of renewal of his appointment with the ILO. The termination of his contract with the ITU - even though the ILO undertakes to count his full seniority in the common system - robs him of a basic entitlement, the termination indemnity.

E. The Union presses its pleas in its surrejoinder. In answer to the charge of breach of entitlement to termination indemnity it submits that the purpose of the indemnity is to compensate the loss not just of an essential term of employment but of employment itself and the discontinuity of service within the common system. The complainant therefore has no claim to termination indemnity. Disagreement over the purport or interpretation of a decision does not ipso facto warrant an award of moral damages; nor indeed does the regrettable delay over the appeal.

CONSIDERATIONS:

1. In April 1986 the complainant joined the ITU as an English editor at grade P.3 with its International Frequency Registration Board (IFRB). He had fixed-term contracts up to 20 April 1988, when the Union granted him a permanent one.

2. On 23 February 1990 the Chief of the IFRB told him orally that his post would be abolished at the end of the year but said that the Administrative Council still had to confirm the decision in June. On 8 March 1990 the Chief of the Personnel and Social Protection Department informed him that in the absence of any other suitable post he would do whatever he could to find one that matched the complainant's background and qualifications in another international organisation within the system.

3. On 19 March 1990 the Chief of Personnel sent his counterpart at the International Labour Office (ILO) a letter recommending the complainant and explaining why his post was to be abolished as from 1 January 1991. On 3 July 1990 the ILO told the complainant it would offer him a fixed-term appointment and on 4 September he signed a two-year contract with the ILO with effect from 2 September 1990.

4. Also on 4 September the complainant wrote to the Secretary-General of the Union about his entitlement under the

rules to termination indemnity, which he said he by no means intended to waive. In a letter of 13 September 1990 the ITU's Chief of Personnel informed him that the Secretary-General had decided as an exceptional measure to conserve his entitlement but only for two years as from 2 September 1990.

5. On 25 October 1990 he asked the Secretary-General to review the decision. The Secretary-General having rejected his request on 29 November 1990 and having later denied him leave to go straight to the Tribunal, he appealed to the Appeal Board on 20 February 1991.

6. In its report of 2 August 1991 the Board took the view that he had an acquired right to the termination indemnity and that his entitlement should be safeguarded whatever might happen: whether the ILO were to terminate his appointment, extend it or fail to renew it. But before making a final recommendation the Board wanted to find out about the Secretary-General's stand.

7. In a memorandum of 7 October 1991 the Secretary-General told the chairman of the Board that he agreed with its report but had reservations in particular about the complainant's alleged acquired rights. In a memorandum of 29 May 1992 the Board said that it took the Secretary-General to mean that the ITU would not be liable towards the complainant beyond the two years his contract was to run at the ILO and it asked the Secretary-General to confirm that this was what he meant. In view of the concurring opinions that the ILO expressed on 11 June and the ITU on 28 July the Board sent the Secretary-General an "amendment" to its report on 19 October in which it absolved the ITU of any liability towards the complainant. The ILO extended his appointment by one year on 6 October.

8. The Secretary-General's final decision of 21 October endorsing the amended report is the one the complainant is impugning. He rests his claim to quashing on the improper composition of the Appeal Board, breach of his right to termination indemnity, and the Union's failure to act in good faith.

The composition of the Appeal Board

9. His main objection to the make-up of the Board is that not all of the members who signed the report of 2 August 1991 took part in the review of his case on 19 October 1992. Though Mr. Irmer was in the chair on both occasions, the two other members were in the first instance Mr. Sant, the regular member representing the IFRB - where the complainant was working - and Mr. Vérove, the regular member elected by the staff; but the second time a new regular member, Mr. Olms,

represented the IFRB and Mr. Fonteyne served as the staff's newly elected regular member. The complainant observes that the members newly appointed on 1 September 1992 were to consider appeals received after that date. But the Board already had his by that time.

10. To account for the attendance of the new members the Union points out that after the appointments of 1 September 1992 Mr. Sant retired and had to be replaced by his former alternate, Mr. Olms, who then became a regular member; though Mr. Vérove was kept on he became an alternate and refused to sit; and though of course he had had an alternate before 1 September 1992, Mrs. Bourne, she too declined to sit. Being thus unable in practice to enlist either the former members who were already familiar with the case or indeed any member who had been on the Board before 1 September 1992, the ITU had no choice but to appoint new people to represent the IFRB and the staff on 19 October 1992.

11. The Tribunal holds that, in view of the particular circumstances described in 10 above, the Board's membership was in keeping with the provisions of Rule 11.1.1.3 and so it serves no purpose to ask, as the complainant does, whether the Board's conclusions would have differed if its members had been as before.

The entitlement to termination indemnity

12. The complainant further objects that the impugned decision infringed his right to termination indemnity under Regulation 9.6 a), which says that "staff members whose appointments are terminated because of abolition of the post or reduction of the staff shall be paid an indemnity". His, he believes, is such a case: he got oral notice on 23 February 1990 of termination for abolition of post at the end of 1990 and on 8 March 1990 he had it confirmed.

13. The ITU retorts that there had been no actual termination of his appointment by 2 September 1990, when he left to take up duty at the ILO. It argues that entitlement to termination indemnity flows not from the anticipation or risk of termination but from actual severance of the contractual bonds between an official and an employer who can no longer keep him. What in the Union's submission caused the break in the complainant's appointment was his transfer to the ILO under the Inter-Organization Agreement concerning transfer of staff between organisations within the United Nations common system.

14. The plea is successful. Although the termination of the complainant's appointment on account of the abolition of his post from 1 January 1991 had been mooted as early as

February 1990 there is no evidence that any such decision was taken before he left the ITU on 2 September 1990. So there is no substance in his contention that his leaving the ITU was due to the abolition of his post. The correspondence shows that, as the Union argues, he left the ITU on transfer to the ILO under the Inter-Organization Agreement. The Chief of the Personnel Development Branch at the ILO pointed that out to him in the formal offer of appointment of 27 July 1990: "your assignment ... will be treated as an inter-agency transfer". In like terms the Chief of Personnel at the ITU told him on 30 August 1990 that his "transfer to the ILO" was "accepted with effect from 2 September 1990". So his case falls under paragraph 8 a) of the Agreement, which says that "a staff member who is transferred will cease as from the date of transfer to have any contractual relationship with the releasing organization". He is therefore mistaken in contending that he was dismissed for abolition of post.

15. He may not rely a contrario on the fact that his case is not mentioned among those for which Regulation 9.6 e) excludes payment of termination indemnity since - as has been said - his was a case of transfer under the Agreement, not of termination.

16. The Tribunal finds no more cogent his plea that payment of the indemnity may be due to him for the loss of a fundamental term of his conditions of employment, namely the security of a permanent appointment, on his getting only a fixed-term one.

17. Entitlement to termination indemnity arises only in cases of separation for abolition of post. On the date of transfer his appointment had not been terminated, and there is no provision in the Regulations for the award of indemnities in cases other than those set out in 9.6. Security of tenure in cases of transfer comes under paragraph 8 c) of the Agreement, which reads:

> "Subject to satisfactory completion by the staff member of any period of probation which it may require, the receiving organization will, if it is possible to do so in accordance with its normal policies, grant him an appointment of duration not less than that of his appointment in the releasing organization".

So it was up to the ILO as the receiving organisation to ensure that the complainant would not lose the security of a permanent appointment, and if he lost it he should have asked the ILO to comply with the material provision. But he failed to do so, even though he was fully aware by 3 July 1990 of the ILO's intention of offering him only a fixed-term contract, which he accepted without qualification on 4 September 1990.

18. He submits that if he had let matters drag on for four months - from September to December 1990 - he would have had no difficulty in getting the indemnity and that he went to the ILO only because his post was being done away with.

19. The argument would be sustainable only if by the time of his transfer to the ILO his post had actually been abolished. But it had not. Moreover, the condition for getting the indemnity was termination and that would have ruled out transfer since he would no longer have been on the staff of the Union. In any event there are no grounds for assuming that the ILO would have taken him on once the four months had passed.

20. His argument under this head being devoid of merit, the plea based on breach of entitlement to termination indemnity fails.

The Union's duty to act in good faith

21. Lastly, he pleads breach of good faith, the gist of it being the length of the internal proceedings. It took the Secretary-General two years to give him a final reply to his request of 25 October 1990 for review. Twenty months elapsed between the lodging of his appeal with the Appeal Board and its amended report and that was sixteen months over the fourteen weeks that Regulation 11 1.1.4 f) allows.

22. The Tribunal observes first that the alleged delay was not wholly the Secretary-General's fault. What is more, it took him little more than a month to reply on 29 November 1990 to the initial appeal of 25 October 1990 and only two days to take the final decision of 21 October 1992 after examining the Appeal Board's amended report of 19 October. The rather long time which the Board took from the lodging of the complainant's appeal to the submission of its amended report is due partly to the Staff Council's having refrained from taking part in the Board's work from December 1991 to May 1992 and partly to changes in its membership following the appointments of 1 September 1992. In any event such delay, however regrettable, was not in the circumstances of this case such as to impair the lawfulness of the impugned decision or cast doubt on the Union's good faith.

23. The complainant's main claims to termination indemnity having failed, so too do his claims to damages for alleged moral injury and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re GILLESPIE Judgment 1327

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mr. George Gillespie against the Pan American Health Organization (PAHO) on 22 January 1993 and corrected on 11 March, the PAHO's reply of 21 April and the letter of 14 June 1993 from the complainant's counsel informing the Registrar that he did not wish to rejoin;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, PAHO Staff Rules 1020 and 1230.7, Manual provision II.9.70 and PAHO Directive 78-10 of 4 May 1978;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United Kingdom who was born in 1931, joined the staff of the PAHO in November 1967 as a dental officer at grade P.4. The Organization employed him under contracts that it regularly extended. In September 1972 it upgraded his post to P.5 and promoted him to that grade. By a letter of 17 November 1988 the Chief of Personnel told him that his appointment would be extended under Staff Rule 1020.1 until 30 June 1991, the last day of the month in which he was to reach the compulsory retirement age of 60.

In a memorandum of 28 September 1990 to the complainant the Chief of Personnel outlined the terms for granting him home leave in 1990 and 1991, stipulating that there must be "at least twelve months interval between home leaves" and he must take such leave "no later than December 1991 so that there is at least six months remaining to your contract upon your return".

In a letter of 13 March 1991 to the complainant the Chief of Personnel confirmed that he would retire at 30 June 1991 in compliance with Rule 1020. He applied for an extension of contract for personal reasons in a letter dated 27 March to the Director of the PAHO. By a letter of 16 April the Chief of Personnel again confirmed the date of his retirement.

The complainant became president of the Staff Association on 1 May 1991 but resigned on 20 May.

In a letter of 15 May to the Chief of Personnel he objected to the letter of 16 April. On 28 May the Chief of Personnel acknowledged receipt. The complainant sent him another letter on 17 June and the Chief of Personnel wrote in reply on 21 June to say that his retirement had already been processed.

In a letter of 17 August 1991, received on 22 August, he gave the Board of Appeal notice of appeal. In their report dated 24-28 August 1992 the members of the Board held by four to one that the appeal was irreceivable, having been filed beyond the 60-day time limit stipulated in the Staff Rules.

In a letter of 23 October 1992 the Director of the PAHO informed the complainant that he accepted the Board's view. That is the decision impugned.

B. The complainant submits that his internal appeal was receivable. Staff Rule 1230.7.1, he observes, states:

> "No staff member shall bring an appeal ... until ... the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

and Rule 1230.7.3 says:

> "A staff member wishing to appeal against a final action must dispatch to the Board, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal ..."

He observes that Directive 78-10 of 4 May 1978 reaffirms that under the rule that then corresponded to what is now Rule 1230.7.1 the Chief of Personnel must let a staff member know when a decision is final and whether it is appealable. Since the letter that the Chief of Personnel sent him on 13 March 1991 did not say that the action was "final" he got no due notice of it. The sixty-day time limit for internal appeal therefore did not start until the actual date of his retirement - 30 June 1991 - and since he filed notice of appeal 53 days later, on 22 August, he acted in time.

He argues alternatively that when they met on 27 March 1991 the Director advised him to apply for an extension "for personal reasons". If the letter of 13 March had indeed been the "final action" within the meaning of Rule 1230.7.1 such advice would have made no sense. Further communications from the Chief of Personnel led the complainant to believe that no final action had been taken: the letter of 16 April said "In the event that there is a possibility later on to alter this course of action ..." and the letter of 28 May said that the Chief of Personnel would inform the Director of the complainant's "concerns", something that would have been pointless had a final decision already been taken. So the earliest possible notice of a final action came when he got the letter of 21 June 1991, i.e. on 25 June, and he filed notice of appeal 58 days after that date, and so again was in time.

Turning to the merits, he contends that the Director made an enforceable promise to extend his contract but failed, merely because he had exercised his right of association, to keep that promise.

He cites Judgment 782 (in re Gieser):

> "According to the rules of good faith anyone to whom a promise is made may expect it to be kept ...
>
> The right is conditional. One condition is that the promise should be substantive, i.e. to act, or not to act, or to allow."

In September and November 1990, he says, he had talks with the Director that were neither witnessed nor recorded and in which the Director told him that his contract would be extended to June 1992. In further talks in February 1991 the Director appeared to take such extension for granted.

Circumstantial evidence, too, corroborates his allegations of a promise. First, the Chief of Personnel's memorandum of 28 September 1990 said that home leave must be taken "no later than December 1991 so that there is at least six months remaining to your contract upon your return": the six months would have expired in June 1992, at the end of the promised extension. Secondly, under Manual provision II.9.70 the Personnel Department normally reminds the supervisor of the staff member's retirement at least six months beforehand. In his case it should have done so by 31 December 1990 but did not. Thirdly, while on mission to Buenos Aires in November 1990 the Director, according to a signed statement by a dentist working on PAHO programmes in Latin America, had a conversation about the complainant with that dentist which gave him the impression that the complainant would stay on beyond June 1991.

The complainant further pleads breach of his right of association. Only two days after the deadline for nominations for president of the Staff Association did he get the letter of 13 March. The Staff Association was in bad odour with the Director at the time and the Director wanted to get rid of him on the grounds that - to quote the complainant - he was "biting the hand that promised to feed him".

He seeks reinstatement as from 1 July 1991 and awards of damages for moral injury, and costs.

C. In its reply the PAHO contends that the complaint is irreceivable because the complainant appealed to the Board of Appeal after expiry of the sixty-day time limit in the Staff Rules. The Director's final decision to apply Rule 1020 and make him retire at the age of 60 was in the letter of 13 March 1991 from the Chief of Personnel.

Besides, his complaint is devoid of merit. The Director made him no promise of extension beyond the age of retirement. Judgment 782 is irrelevant because, for a promise of extension to be "substantive", there must be action by the Director in the form of explicit instructions to the Chief of Personnel. There were no such instructions; nor did the memorandum of 28 September 1990 from the Personnel Department about the complainant's home leave make any explicit promise of extension.

His right of association was fully respected. He resigned of his own accord as president of the Staff Association because he did not qualify for the position on retirement.

CONSIDERATIONS:

1. After he had served the PAHO for 23 years the complainant's contract was to expire on his reaching the compulsory age of retirement on 30 June 1991. He was refused an extension of contract and in this complaint he is claiming "reinstatement" in accordance with Rule 1020.1 of the PAHO Staff Rules, which reads:

> "Staff members shall retire on the last day of the month in which they reach the age of 60. In exceptional circumstances the Director may, in the interests of the [Organization], extend the retirement age ..."

2. The complainant alleges that in private talks in September and November 1990 the Director of the Organization promised to extend his appointment up to 30 June 1992. The Organization denies any such promise.

3. By a letter dated 13 March 1991 the Chief of Personnel informed the complainant that the Organization confirmed his retirement on 30 June 1991. The complainant alleges that at a discussion on 27 March 1991 the Director said that he had decided "not to sign an extension of ... contract" but might consider a request from him for an extension "for personal reasons". The complainant immediately made such a request. But on 16 April the Chief of Personnel replied on the Director's behalf confirming termination at the compulsory age of retirement as notified by his letter of 13 March 1991 but adding that "in the event that there is a possibility later on to alter this course of action, we shall not fail to communicate with you". After further correspondence the Chief of Personnel wrote him a letter on 21 June 1991 confirming the date of retirement but again giving an assurance that he would not "fail to let [the complainant] know in the event there is any change in this matter".

4. Rule 1230.7.1 of the PAHO Staff Rules reads:

> "No staff member shall bring an appeal before the Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

And Rule 1230.7.3 provides:

> "A staff member wishing to appeal against a final action must dispatch to the Board, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal, specifying the action against which appeal is made and the subsection or sections of Rule 1230.1 under which the appeal is filed. The Board shall open its proceedings at the earliest possible moment after receipt of the appellant's full statement of his case."

5. The complainant appealed to the Board of Appeal on 17 August 1991 against the refusal of extension of contract in the letter of 21 June 1991. In its report dated 24-28 August 1992 the Board concluded by a majority of four to one that his appeal was irreceivable because he had failed to lodge it within sixty days - the time limit set in Rule 1230.7.3 - of the decision of 13 March 1991, which the Board regarded as the "final action" on the matter of his retirement. The dissenting member of the Board took the view that the decision of 13 March was just the first notice of retirement that the PAHO had given him, that the ensuing correspondence gave effect to his right to exhaust administrative channels before submitting an appeal, and that his appeal was therefore receivable, although on the

merits it was "frivolous". In a letter of 23 October 1992 to the complainant the Director said that he accepted the view of the majority and noted the minority opinion that his case was frivolous.

6. The complainant is impugning that decision and is claiming reinstatement and awards of damages for moral injury and of costs. He contends that since the Director had invited him on 27 March 1991 to apply for extension the letter of 13 March 1991 might not be treated as "final action" within the meaning of Rule 1230.7.1 and that the letter of 16 April 1991 was not final either because it left open the possibility of a change of position. He also relies on Directive 78-10 of 4 May 1978, which says that "it is for the Chief of Personnel to inform a staff member when an action or decision is final in terms of [the relevant] Staff Rule"; he submits that the Chief of Personnel failed to inform him that either of the two letters was final.

7. The Tribunal holds that the letter of 13 March 1991 from the Chief of Personnel is to be treated as the Organization's final decision that the complainant should retire at 30 June 1991 in accordance with the compulsory age of retirement in Rule 1020.1. That decision remained "final" within the meaning of Rule 1230.7.1 even though later incidents and correspondence may have suggested that there was some possibility of a change in the Organization's position. The fact that the Chief of Personnel failed to comply with the directive the complainant cites is immaterial to determining the starting date of the time limit: see Judgment 918 (in re Schmid) under 9.

8. As the majority of the Board of Appeal held, the complainant's internal appeal was irreceivable because he had not filed it within the time limit of sixty days after notification of the final decision in the letter of 13 March 1991. Since he therefore failed to exhaust the internal means of redress, his present complaint too is irreceivable under Article VII(1) of the Tribunal's Statute. That being so, there is no need to go into the merits of the case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

Wm Douglas

William Douglas

P. Pescatore

P. Pescatore

Mark Fernando

AB Gardner

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL | INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF | *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re BLUSKE (No. 3)
(Application for execution)

Judgment 1328

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 1242 filed by Mr. Guillermo Carlos Bluske on 29 July 1993, the reply of 13 September from the World Intellectual Property Organization (WIPO), the complainant's rejoinder of 12 October and the Organization's surrejoinder of 12 November 1993;

Considering Articles II, paragraph 5, VII, paragraph 1, and XII of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS:

1. In this, his third, complaint Mr. Bluske is seeking an order from the Tribunal against the World Intellectual Property Organization (WIPO) on the grounds of its failure to execute Judgment 1242 of 10 February 1993.

2. Judgment 1242 was prompted by the Organization's failure to execute Judgment 1154, which had quashed a decision by the Director General not to extend the complainant's fixed-term appointment. The relevant rulings are:

Judgment 1154

> "2. The Organization shall reinstate the complainant by extending his appointment as from 16 June 1991.
>
> 3. If it cannot do so it shall pay him the equivalent of one year's salary and allowances in damages for all forms of injury he has sustained."

Judgment 1242

"2. The case is sent back to the Organization for a new decision on the reinstatement of the complainant.

3. The Organization shall pay the complainant the equivalent of one further year's salary and allowances in damages for all forms of injury he has sustained because of its failure to execute Judgment 1154.

4. It shall pay him 10,000 French francs in costs."

3. The facts are that the Organization has paid the complainant 130,156.45 Swiss francs under Judgment 1154 but has not yet discharged either of its obligations under Judgment 1242: to take a new decision on whether or not to reinstate him, and to pay him the one further year's salary and allowances.

4. The complainant observes that the Organization's response to the action he took to secure the execution of Judgment 1242 and to a formal claim he put to it on 15 March 1993 was to tell him through its agent, a member of the Bar of Geneva, that it was willing "to look for some common ground of understanding" and start negotiating with him. Seeing that as dilatory tactics intended to evade straightforward execution of Judgment 1242, he has chosen to come directly to the Tribunal to secure such execution and, failing reinstatement, an award of damages tantamount to the full reconstitution of his past and future career and the restoration of his pension entitlements.

5. WIPO maintains that for two reasons the complaint is irreceivable. First, it contends that the Tribunal may not hear any dispute over failure to execute one of its own judgments because Article II of its Statute does not say it is competent to do so. Secondly, it argues that insofar as the complainant is pleading failure to take a new decision about reinstating him he ought first to have followed the appeal procedure within the Organization and his complaint is irreceivable because he has not exhausted the internal means of redress as Article VII(1) of the Tribunal's Statute requires.

6. On the merits the Organization points out that the complainant held a fixed-term appointment which it had no duty to renew on expiry. In accordance with Judgment 1242 it has, it says, made genuine efforts to reinstate him but reassigning him proves impossible because his attainments are limited: he has no legal or technical qualifications for work on patents and his knowledge of languages does not fit him for work anywhere but in Latin America. It has therefore offered to settle out of court, but he has turned the offer down.

7. Lastly, WIPO says that paying the large awards the Tribunal has made against it in the two judgments is a problem for its budget. The order in Judgment 1154 having been duly executed, the Director General may feel compelled to put the matter of the order in Judgment 1242 to the Organization's political authorities. There is a risk that after looking into the matter its Coordination Committee may consider declining to act on Judgment 1242 or even reviewing its recognition of the Tribunal's jurisdiction.

8. Those submissions reveal several misunderstandings between the parties about what Judgment 1242 means and how it relates to Judgment 1154. But before taking up those issues the Tribunal will dispose of the Organization's pleas about the scope of its competence and the thrust of its rulings.

The Tribunal's competence and the thrust of its rulings

9. In support of its contention that the Tribunal may not hear applications for the execution of its judgments WIPO argues that Article II of its Statute does not say it may, but vests in it competence to hear only disputes about the application to officials of staff regulations and the terms of their appointment.

10. To construe the Statute in that way is to overlook the fact that a dispute of the kind Article II refers to is not resolved until the Tribunal's judgment has been duly executed. So its competence is not exhausted when it passes judgment. Pending full execution the dispute remains unresolved and the Tribunal remains competent to rule on any issues that execution may raise. Thus it may rule on such issues as the interpretation, execution or review of a judgment. The present complaint falls indisputably within the ambit of the Tribunal's competence as so defined. The plea that it does not must therefore fail.

11. Another material point is that the Tribunal's rulings carry the authority of res judicata, save that in accordance with Article XII(1) of its Statute and the Annex thereto their validity may be challenged on referral by an organisation that has recognised its jurisdiction to the International Court of Justice on the grounds of lack of competence or a fundamental fault in the procedure followed. According to Article XII(2) the Court's advisory opinion is accepted in advance as binding. That bears out the absolutely compulsory character of the context in which the Tribunal passes judgment.

12. That rulings by international administrative tribunals are binding in particular where they make awards

against organisations is the corollary of their judicial authority. The International Court of Justice so held in its advisory opinions of 13 July 1954 and 23 October 1956: see the ICJ Reports, 1954, page 4, and 1956, page 77. The opinion of 1956 was about four judgments by this Tribunal: Nos. 17 (in re Duberg), 18 (in re Leff), 19 (in re Wilcox) and 21 (in re Bernstein). In Judgment 553 (in re Usakligil No. 2) of 30 March 1983 the Tribunal explained the nature of the obligation that its rulings lay on an organisation:

> "The Tribunal's judgments have the authority of res judicata. An international organisation which has recognised the Tribunal's jurisdiction is therefore bound, not merely to refrain from acting in disregard of a judgment, but first and foremost to take whatever action the judgment may require. That the judgment must be both respected and executed are thus principles which are beyond dispute, and they apply, in particular, where the organisation is ordered to pay a sum of money.
>
> The debtor's obligation to pay must as a rule be discharged immediately unless the judgment states that the sum be payable only at some later date."

13. The possibility of cancellation of WIPO's recognition of the Tribunal's jurisdiction calls for no comment save that making an international organisation's decisions subject to judicial review affords a basic safeguard both of its own interests and of staff rights. Such a safeguard should not be lightly called into question on account of rulings that may have gone against it in particular cases.

The cause of action and receivability

14. The Tribunal has ordered WIPO twice over to pay the complainant the equivalent of one year's salary and allowances. Judgment 1154 made the award conditional upon the Organization's having made unsuccessful efforts to reinstate him. Judgment 1242 ordered that since the Organization had not made the efforts required the case must again be sent back for a new decision on reinstatement and that "in any event" he was entitled to a further award of damages for the Organization's failure to execute Judgment 1154.

15. So, unlike the award in Judgment 1154, the one in Judgment 1242 is plainly unconditional in that it does not depend on the failure of efforts to reinstate the complainant but affords him redress for the failure to execute the ruling on reinstatement in Judgment 1154.

16. When properly seen in that context the complainant's present claims are not to confirmation of the award in Judgment 1242, which suffices in itself, but to two things: payment as

from 24 March 1993 of interest on the sums that Judgment 1242 ordered WIPO in points 3 and 4 to pay him; and execution of the ruling in Judgment 1242 that WIPO must take "a new decision on the reinstatement of the complainant".

17. The foregoing shows the Organization to be mistaken in challenging receivability on the grounds of the complainant's failure to exhaust internal remedies. His sole purpose is to resolve the difficulties that have arisen over execution of Judgment 1242 because of the Organization's failure to discharge its obligations thereunder. As was said in Judgment 732 (in re Loroch No. 3) under 2, "When there is difficulty over the execution of a judgment either side may as a rule seek the Tribunal's assistance and there is no need to go through the internal appeal procedure beforehand".

The merits

18. The claim to interest is allowed on account of the Organization's failure to pay promptly the awards in points 3 and 4 of Judgment 1242.

19. As for its failure to take the "new decision" ordered in point 2, it is in breach of good faith in forcing the complainant to the point of appealing against a refusal he has to infer from its own silence. Under point 2 it is required to give him an express and properly substantiated decision on the matter of reinstatement, whether he is reinstated or not.

20. On that score the case is sent back to the Organization for the earliest possible decision on the issue, the complainant's further claims being therefore immaterial.

DECISION:

For the above reasons,

1. WIPO shall pay the complainant compound interest reckoned as from 24 March 1993 at the rate of 10 per cent a year on the awards in Judgment 1242 under points 3 and 4.

2. The case is sent back to the Organization so that it may take at the earliest possible date the express and properly substantiated decision that Judgment 1242 requires under point 2.

3. It shall pay the complainant 10,000 French francs in costs.

4. His other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re BALL and BORGHINI

Judgment 1329

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Derek Ball and Mr. Michel Borghini against the European Organization for Nuclear Research (CERN) on 11 November 1992 and corrected on 18 December 1992, CERN's replies of 14 April 1993, the complainants' rejoinders of 18 June and the Organization's surrejoinders of 24 September 1993;

Considering the applications to intervene filed by:

J.-P. A Marca
G. Acquistapace
M. d'Adhémar
G. Adrian
F. Aeschimann
V. Agoritsas
A. Albiker
L. Aliu
G. Allaman
M.-N. Alliod
P. Alliod
X. Altuna
J. Alvera
B. Amacker
L. Amevet
T. d'Amico
H. Ancey
P. Anderssen
J. André
R. Angelloz-Nicoud
G. Antoinet
H. Arandel
J.-C. Armand
A. Arn
C. Arnaud
H. Atherton
A. Auberson
J.-P. Audebert
M. Audria
R. Audria
R. Augier
M. d'Auria
J.-P. Avondo-Bedone
M. Aymon
G. Azzoni
R. Bachelard
J. Baczynski
J.-M. Baillod
P. Bailly
G. Bain
S. Baird
L. Baisin
D. Bakker
F. Bal
C. Baleur
C. Ball
R. Bapst
S. Bapst-Deville
M. Barbi
A. Bardin
A. Barlow
J.-C. Baronnet
M. Barranco-Luque
M. Barth
M. Bärtschi
C. Bastie

S. Battisti
C. Baubry
M. Baucher
C. Baud
G. Baud
J.-P. Baud
R. Baud
S. Baudet
Y. Baudic
K. Baulmann
R. Baum
S. Beauquis
C. Beetham
B. Bel
J.-F. Bel
A. Belk
A. Bellanger
J. Belleman
M. Beltrando
J.-L. Bénichou
J.-C. Benoît
B. Benoît-Jeannin
G. Berard
R. Berard
M. Berardo
A. Bergamaschi
P. Berlinghi
R. Bernard
P. Bernardini
J. Bernasconi
D. Berthet
R. Bertinotti
S. Berto
C. Bertoux
J.-C. Bertrand
J.-P. Bertuzzi
L. Besson
A. Bezaguet
G. Bezard-Brown
E. Bianchi
J. Bilger
J.-P. Bindi
C. Bizeau
H. Blaha
W. Blair
J.-L. Blanc
R. Blanc
J. Blanchard
F. Blas
J.-P. Blaser
N. Blazianu
H. Blessing
André Blin
Antoine Blin
J. Blondel
P. Blondelle
J.-M. Boban
P. Bobbio
G. Boch
G. Bochaton
M. Bochicchio
M. Boffard
O. Bohner
D. Boileau
R. Boileau
D. Boimond
R. Boiry
Y. Boisard
C. Boissat
J.-P. Boiteux
G. Boixader
M. Bole-Feysot
A.-M. Bolomey
G. Bonfillou
M. Bongiovanni
G. Bonnefond
L. Bonnefoy
M. Bonnet
H. Bont
J. Bonthond
G. Bonvallet
L. Borcier
M. Bornet
P. Bossus
H. Bouchat
J.-M. Bouché
J. Boucher
R. Bouhot
W. Boult
R. Bouquin
R. Bourgeois
J.-C. Bourigault
P. Bouriot
J.-M. Bousset
G. Bouvry
R. Bouvry
M.-H. Bovard
J.-P. Brachet
D. Brahy
L. Braize

M. Branchard
J.-P. Brand
K. Braun
J. Brendle
P. Bresciani
R. Bresson
P. Bricchi
L. Briot
R. Brocard
M. Brolli
E. Brouzet
P. Brown
R. Brown
D. Brozzi
Y. Bru
P. Brummer
G. Brun
R. Brun
B. Brunel
J.-C. Brunet
M. Brunet
E. Buchschacher
L. Buffaz
C. Bugnone
R. Bühler
J. Buon
G. Burdet
P. Burkimsher
H. Burmeister
A. Burns
G. Busetta
C. Buttay
G. Cachin
N. Caillet
S. Cairanti
A. Calderone
J. Camas
R. Cambarrat
W. Cameron
R. Campergue
D. Campi
P. Camus
C. Camut
P. Canard
G. Caniac
S. Cannon
G. Canova
J. Capestrani
J.-D. Capt
M. Carchia
F. Carena
W. Carena
J.-C. Carlier
D. Carminati
M. Caron
D. Carpentier
E. Carpin
J.-C. Carpin
Y. Carrère
I. Carriero
G. Carron
C. Carter
A. Cass
R. Castant
A. Castel
G. Castelli
J. Cathenoz
M. Cathenoz
R. Catherall
J.-C. Catin
G. Cavallari
A. Cavalli
P. Cavallo
M. Cayla
R. Ceccato
L. Ceccone
C. Cerruti
R. Chacornac
P. Chaffard
D. Chalamet
C. Challes
C. Chalons
M. Chambardon
R. Chanut
A. Chapman-Hatchett
J. Chapuis
C. Charlotton
F. Charmot
P. Charra
P. Charrue
B. Charveys
M. Chassard
J. Chasseloup de Laubat
M. Chatel
A. Chavanel
H. Chenavard
A. Cheneval-Pallud
J.-L. Chevalley
T. Chevret
Y. Chevret
E. Chiaveri
G. Chil
V. Chohan
C.-M. Chollet

Yvette Cholley
Yvon Cholley
J. Chouard
A. Chouvelon
D. Claes
R. Claret
G. Claude
B. Clerc
S. Clerc
F. Cliff
R. Coccoli
E. Cochet
D. Cocq
R. Coignée
A. Coin
A. Cojan
G. Colin
R. Collomb
G. Collongues
M. Comte
J. Conciencia
M. Condemine
F. Coninckx
A. Contat
R. Contival
H. Conus
M. Corcelle
D. Cornuet
F. Cossey Puget
M. Coti
H. Coudray
M. Couturier
G. Cuccuru
A. Cuenca-Perez
R. Cuenot
G. Cumer
P. Da Costa
S. Dalbignat
J. Dall'Igna
D. Dallman
G. Dalloz
M. Dalloz
M. Damiani
A. Daneels
M. Danesin
P. Danzeisen
S. Datta-Cockerill
F. Daveine
D. David
E. David
A. Davis
M. Decombaz
R. Décombaz
P. Defert
C. Degrange
C. Dehavay
D. Dekkers
R. Del-Monaco
F. Deladoey
A. Delattre
M. Delattre
Y. Delenclos
M. Delidais
J.-C. Deligny
A. Delizée
R. Della Biancia
R. Delsole
E. Deluermoz
M.-T. Demornex
M. Demoulin
J.-L. Denblyden
D. Denuzière
H. Depierre
N. Dépierre
M. Derosiaux
M. Deroussent
P. Deroyer
C. Desbissons
B. Desforges
C. Desmaris
C. Despas
R. Desperier
M. Desroziers
J.-M. Dessi
D. Deville
S. Di Pietro
M. Diedrich
R. Dillon
M. Diraison
M. Disdier
N.-D. Dixon
G. Dolivet
A. Doméniconi
J. Doméniconi
G. Dominichini
F. de Donato
P. Donnat-Bouillud
J. Donnier
J. Doody
V. Doré
T. Dorenbos
J. Drecourt
G. Drouet
P. Droux

G. Dubail
P. Dubief
M. Dubois
C. Ducastel
B. Ducret
N. Dudragne
M. Dufourd
B. Dumas
G. Dumont
A. Dumur
L. Dunand
N. Dunand
D. Dupraz
P. Duraffourg
J. Durand
M. Durand
M. Duret
E. Durieu
B. Duthion
J.-M. Dutour
N. Eatough
C. Ecarnot
H. Elattar
M. Ellefsplass
H. Emery
G. Engelmann
T. Ericson
C. Escaffre
J.-L. Escourrou
M. Etienne
L. Even
M. Eveno
H. Excoffier
J.-P. Fabre
J.-C. Fabris
R. Faes
M. Farastier
J.-J. Farey
M. Faure
C. Favre
A. Fayet
R. Feix
G. Ferioli
A. Feron
C. Ferrari
G.-P. Ferri
G. Fersurella
A. Fiebig
C. Fischer
J. Fivet
M. Flachat
A. Flamand
H. Flotow
M. Fluckiger
G. Focker
A. Folley
L. Fonovich
J. Fontaine
M. Fontanet
R. Forrest
H. Fouilloux
G. Fournier
A. Fowler
J.-M. Fraigne
D. Fraissard
J. Fraisse
J.-C. Frances
F. Francia
A. François
G. Françon
P. Frandsen
M. Frauchiger
G. Frick
P. Frolot
C. Fromm
D. Fromm
J.-C. Frot
M. Frot
J. Fullerton
F. Gagliardi
D. Gagnière
H. Gaillard
Y. Gaillard
B. Gaillard-Grenadier
P. Galbraith
G. Gallay
J.-C. Gallois
B. Galmant
C. Galmant
A. Gandi
J.-L. Garavel
J.-F. Garçon
Y. Gardette
J. Gardies
P. Garel
J. Gareyte
V. Garlenc
R. Garoby
M. Gasparini
A. Gasser
P. Gauss
M. Gautier
R. Gay
D. Geiss

R. Genand
J.-P. Gendras
M. Genet
J. Genevois
C. Genier
M. de Gennaro
C. Gentet
M. Geoffroy
V. Gérard
P. Geroudet
J.-C. Gervais
P. Gervasoni
M. Gevrey
G. Geydet
F. Ghinet
M. Giesch
J.-M. Giguet
J. Gilquin
D. Girard
M. Girardini
A. Girardoz
F. Giudici
P.-A. Giudici
M. Glaser
B. Goïcoechea
M. Goossens
P. Gorce
W. Gorlitz
J.-J. Gottraux
M. Goujon
P. Gourcy
I. Graf
J. Graff
J.-M. Grand'Homme
G. Granger
G. Grangier
N. Grant
D. Graskamp
C. Gregory
C. Grenouilleau
P. Griessen
C. Griggs
G.-P. Grillet
J. de Groot
M. Gros
C. Groscarret
M. Grospiron
J. Groz
F. Guénéhec
C. Guenin
J. Guérin
L. Guerrero

A. Guiard-Marigny
G. Guignard
A. Guillaume
J. Guillet
C. Guillet-Dauphiné
M. Guillon
J. Guiraud
J.-C. Guiraud
W. Gunder
G. Gurrieri
D. Guyon
R. Guyon
M. Gyr
J. Haffner
J.-B. Hainaud
M. Hajdinjak
B. Hallgren
J. Halon
P. Hannhart
R. Hänni
J.-M. Hanon
M. Hansroul
M. Hausermann
H. Hayes
H. Heijne
G. Henchoz
L. Henny
M. Hénoux
E. Heritier
C. Herman
L.-G. Hernberg
P. Herzog
A. Hester
A. Hilaire
N. Hilleret
P. Hirbec
Y. Hog
R. Hoh
M. Hourican
M. Howie
J.-P. Huber
G. Huet
A. Hugi
B. Hugot
S. Hutchins
J. Igo-Kemenes
A. Ijspeert
H. Isch
C. Isnard
D. Jacob
A. Jacquemin
C. Jacquemoud

A. Jaeger
R. Jaggi
W. Jank
M. Jeanrenaud
M. Jenin
M. Jimenez
L. de Jonge
F. Josa
M. Jouhet
J. Jourdan
C. Jouve
G. Juban
J.-F. Juget
J.-C. Juillard
F. Julliard
L. Kaczmarek
R. Kaiser
E. Kaiser-Bouzelmat
K. Karner
T. Kehrer
M. King
C. Kirchner
A. Knight
G. Knott
J. Knott
J. Koopman
R. Kopp
L.-J. Kottelat
H. Kropf
M. Kubly
H.-K. Kuhn
H. Kummer
A. Kupferschmid
I. Kurth
A. Küttel
F. Küttel
A. Lacourt
C. Lacroix
D. Lacroix
M. Lafaverges
J.-P. Lagrue
J. Lahaye
B. Lambert
M. Lamidon
G. Lamoureux
P. Lançon
J.-C. Langelez
H. Laporte
J.-P. Lappe
G. Larour
G. Lartigue
J.-C. Lassalle
R. Lassausaie
A. Lasserre
R. Laude
S. Laudet
G. Launay
S. Lauper
M. Laurent
L. Lauri
P. Le Cossec
M. Le Gras
N. Le Vasseur
G. Lebée
B. Lebegue
P. Lebrun
P. Leclère
G. Lecoeur
A. Lecomte
P. Lecoq
C. Leech O'Neale
P. Lefèvre
L. Leggiero
P. Legrand
P. Lelourdy
F. Lemeilleur
P. Lenot
J. Lepagnot
D. Leroy
G. Leroy
E. Lessmann
C. Lestienne
P. Lestienne
M. Letheren
M. Letisserand
J. Letort
L. Levrat
Alain Levrier
Antonia Levrier
K. Ley
B. Libera
G. Linser
C. Lissajoux
J. Lissajoux
G. Lobeau
K.-D. Lohmann
G. Lohr
P. Loïez
B. Lombard
S. Long
J.-L. Loquet
R. Lorenzi
P. Loridon
B. Louchet

P. Loup
F. Louvet
P. Luc
L. Lunardi
H.-D. Lustig
A. Lütke
B. Lutz
A.-J. Mabut
C. Mader
E. Magnani
R. Magnier
F. Magnin
B. Maire
J. Maire
P. Malacarne
R. Mallay
M. Mandray
M. Manent
D. Manglunki
J. Mann
J.-P. Maquenne
C. Marcel
H. Marchal
A. Marchand
C. Margaroli
A. Marin
C. Marin
J.-C. Marin
M. Marquet
F. Martin
G. Martin
J. Martin
D. Martine
H. Martine
G. Martinez
Patricia Martucci
Pietro Martucci
H. Masseboeuf
F. Masset
A. Masson
B. Masson
L. Mastrostefano
R. Matet
J.-P. Matheys
G. Mathis
N. de Matos
B. Maulini
R. Mauris
M. Mayor
M. Mayoud
J. Mazars
A. Mazzari
C. Mazzari
F. McIntosh
J. Melin
R. Menazzi
D. Menoni
C. Menot
G. Merighi
D. Mertina
M. Métais
K.-D. Metzmacher
G.-H. Meyer
H. Meyer
N. Mezin
J.-F. Michaud
E. Michaux
R. Milan
C. Millerin
M. Minella
M. Miolane
D. Mir
R. Mirmand
E. Mitis
R. Mohr
A.-F. Molat-Berbiers
G. Momeux
M. Monesi
R. Monet
M.-T. Monnet
E. Monney
J. Monteiro
C. Montuelle
J. Montuelle
J. Morand
P. Morel
J.-P. Morellet
P. Moret
D. Moriaud
M. Moskofian
J. Motz
G. Mourgue
R. Mourier
D. Mouton
B. Moy
G. Mugnai
Robert Müller
Rolf Müller
V. Munda
R. Mundwiller
S. Muratori
M. Musso
L. Naudon
M. Nawrocki

J. Nebout
K. Neil
R. Nettleton
D. Nibbio
M. Nicod
I. Nicolaou
G. Niel
M. Nielsen
Y. Ninet
E. Nitsch
M. Noldin
A. Notari
L. Oberli
C. Oberto
G. Olesen
R. Olsen
A. Orêve
J. Ottaviani
G. Ozun
C. de Pablos
M. Paccani
G. Paillard
D. Parchet
C. Parthé
B. Pasche
A. Pasquale
J.-P. Pasquet
G. Passardi
L. Passardi
G. Patron
G. Patti
D. Peach
G. Pecheur
R. Péder
R. Pégaitaz
D. Pégat-Toquet
G. Peiro
J.-M. Pelissier
J.-L. Penaud
E. Penny
P. Pequignot
S. Péraire
F. Pérez
C. Perlemoine
M.-C. Perler
A. Perosino
L. Perraud
J.-C. Perreard
A. Perrelle
J.-C. Perrier
J.-J. Perriraz
F. Perrissoud
B. Perritaz
A. Perrot
L. Persello
E. Peschardt
B. Petiot
P. Petit
C. Petit-Jean-Genaz
J. Pett
D. Peytoud
A. Philipona
J. Philippe
R. Piccarreta
G. Pierre
L. Pigni
J.-C. Pinasseau
C. Pinaud
G. Pinaud
P. Pinget
C. Pinto-Pereira
B. Pires
G. Pistolato
M. Pittet
R. Pizot
M. Plaisantin
M. Plasse
R. Platteaux
A. Ployer
R. Ployer
J.-C. Poirier
J. Polaillon
A. Poncet
M. Ponzo
R. Popelin
F. Pouyat
H. Preis
P. Prévost
M. Primadei
K. Protoulis-Dalmaz
D. Prud'Homme
G. Pythoud
F. Quanquin
A. Querrou
L. Quiquandon
M. Quittoud
M. Rabany
M. Rabian
M. Rabian-Content
M. Raclet
U. Raich
G. Rajchman
J. Ramillon
S. Rangod

N. Rasmussen
G. Rau
R. Rausch
J. Raux
B. Raynard
E. Regat
A. Regelbrugge
D. Regin
I. Reguero
F. Reiser
V. Remondino
T. Renaglia
C. Renaud
J. Renaud
Y. Renaud
C. Renaudot
Z. Rendetzky
A. Renou
A. Renoux
F. Revelard
P. Rey
R. Rey-Mermier
C. Reymermier
S. Reynaud
T. Reynes
J.-B. Ribes
C. Ricciardi
Y. Richard
H. Rieder
L. Rinolfi
S. Ritossa
D. Rivalli
C. Rivoiron
G. Robbiano
A. Roberts
J. Robin
M. Robin
J. Roche
G. Rochepeau
F. Rodriguez
A. Roguet
C. Rollinger
G. Rollinger
J. Romand
J.-P. Roméro
D. Rosset
Y. Roussel
C. Roy
J.-P. Royer
M. Royer
E. Rugo
C. Ruiz-Llamas
A. Russo
D. Rybkowski
P. Saillard
E. Saint-Aubert
J.-M. Saint-Viteux
F. Saldana
J.-P. Salmon
H. Salomon
M. Samson
A. Sanders
S. Santiago
G. Santiard
C. Sanz Martin
Y. Sayot
J. Sbaraglia
R. Schall
A. Scharding
J.-P. Scheffre
B. Schellenberg
J.-D. Scheurer
P. Schilly
G. Schmidlin
W. Schmidt
C. Schmitt
M. Schmitt
J.-P. Schnewlin
F. Schöfel
R. Schweitzer
P. Segarra
M. Seguin
C. Seidl
M. Seinera-Buffo
I. Seis
M. Seissau
P. Séraphin
G. Serras
J.-L. Servais
M. Sheehan
P. Sievers
J.-M. Siffredi
M. Sillanoli
J. Simeoni
A. Simon
P. Simon
W. Simon
G. Simonet
R. Simonin
F. Siohan
J. Sladen
L. Soby
E. Soff
A. Solioz

A. Sonzogni
M. Sorrenti
H. Soubeyran
J. Soubeyran
G. Soulière
B. Southworth
K. Spiegel
R. Spigato
G. Spigo
A. Spinks
M. Sporli
R. Stöckli
M. Streit-Bianchi
M. Studer
B. Stumpe
D. Stungo
M. Stuwe
G. Suberlucq
D. Swoboda
B. T'Hart
G. Tallet
M. Tardy
M. Tarrant
M. Tavlet
B. Taylor
D. Taylor
T. Taylor
B. Tercier
A. Thérond
M.-F. Thevenet
M. Thevenon
C. Thiboud
G. Thirolle
J.-M. Thomas
J.-C. Thomi
B. Thony
A. Togninalli
B. Tomat
T. Tortschanoff
J. Toullieux
C. Tournu
G. Tranquille
M. Trebulle
M. Tremblay
P. Trilhe
B. Trincat
G. Trinquart
M. Truchet
D. Tserkezoglou
S. Turner
M. Tyrrell
M. Uldry
J.-L. Valaud
M. Valceschini
B. Valentin
D. Vallet
P. Vallois
C. Van der Vlugt
O. Van der Vossen
A. Van Hove
R. Van Robays
P. Vande Vyvre
M. Vannier
P. Vannier
J. Vanoli
C. Vasseur
L. Veillet
F. Vermeille
D. Vernamonte
J. Vernois
H. Vestergard
E. Vial
J.-P. Vidal
H. Vigier
O. Vigne
J.-M. Vigneau
P. Villard
Patrick Viret
Pierre Viret
T. Visser
M. Vitasse
S. de Vito
D. Vivien
R. Volck
C. Vollerin
S. von Wartburg
L. Vos
M. Vosdey
M. Vretenar
C. Vuitton
B. Vullierme
M. Wachnik
L. Walckiers
A. Wang
E. Watson
G. Waurick
R. Wilhelm
W. Wilkens
J. Wilkinson
I. Willers
D. Williams
M. Wilson
G. Winkler
T. Wiszniowski

F. Wittgenstein
P. Woillet
J. Wolf
M. Zahnd
G. Zambelli
P. Zampaglione
M. Zanolli
A. Zimmer
E. Zimmermann
N. Ziogas
J. Zueras
R. Zurbuchen

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Article V, paragraph 5, of the Convention for the Establishment of a European Organization for Nuclear Research, Articles 6 and 9 of the Rules of Procedure of the CERN Council, Rules IV 1.01, VI 1.01 and VII 1.03 and Regulations R IV 1.01, R VII 1.01 and R VII 1.02 of the CERN Staff Rules and Regulations;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Regulation R IV 1.01 of the Staff Regulations of CERN, which has its headquarters in Geneva, states that "when reviewing remuneration, the Council shall use as a guide an index, the composition and method of calculation of which it shall determine". On 20 December 1979 the Council of CERN accordingly decided on the procedure and method to be followed for five-yearly review of staff pay and annual review of the salary scale. The text of the decision explained that the purpose of the five-yearly review was to establish financial and social conditions for CERN staff that would be in line with the situation in member States; the purpose of annual review was to adjust the scale of basic salaries set in the five-yearly review by reference to the agreed salary index, and the rate of adjustment took two factors into account, trends in the cost of living at Geneva from August to August and the level of pay in the Swiss civil service.

At a meeting on 23 June 1989 the Council decided to set up a body made up of representatives of member States, management and staff that was known at first as the Consultative Committee, and then as the Tripartite Advisory Committee, on Conditions of Employment and to have it study the findings of the five-yearly review that the Administration had carried out earlier that year.

On 14 December 1989, at the close of the annual review in 1989, the Council decided to approve the salary adjustment for 1990 in disregard of the second factor, pay in the Swiss civil service.

The Tripartite Committee's report of 7 June 1990 to the Council offered three differing opinions about the level of pay.

At a meeting on 22 June 1990 the Council decided to raise salaries by 1 per cent as from 1 July 1990 and ask the Administration to start negotiating with the Staff Association. The negotiators agreed when meeting on 29 August 1990 that basic salaries should go up by 6.4 per cent in four instalments: by 1 per cent at 1 July 1990, as decided on 22 June 1990; by 2.4 per cent at 1 January 1991; by 1.5 per cent at 1 January 1992 and by 1.5 per cent at 1 January 1993.

On 11 December 1990 the Finance Committee submitted to the Council recommendations that were based on a motion by a member State, the Netherlands. On 14 December the Council approved a total salary increase of 2 per cent as from 1 January 1991 in the context of the five-yearly review, and a rate of adjustment of 5.09 per cent for 1991.

On 17 and 18 December 1991 the Administration submitted its proposals on the rate of adjustment for 1992 to the Finance Committee and the Council: the cost-of-living increase at Geneva warranted a weighted average salary adjustment of 5.37 per cent; and after review of pay in the Swiss civil service there should be a comprehensive increase of 1.67 per cent over and above the rate of inflation.

On 18 December 1991 the Finance Committee approved the Administration's proposals about the cost-of-living increase. On 20 December the Council introduced a new procedure for voting in the Finance Committee: as from 1 January 1992 the Committee's decisions were to be taken by a "double" majority: a majority of Members and a majority that accounted for 55 per cent of Members' contributions to the Organization's budget. At the same meeting the Council approved an increase in salaries of 5.5 per cent for 1992.

Mr. Ball, who joined CERN in 1959, was elected Vice-Chairman of the Staff Association in January 1991. Mr. Borghini was recruited in 1965 and was elected Chairman of the Staff Association in June 1990.

On 15 January 1992 the complainants received pay slips for that month and saw that their basic salary had gone up by 5.7 per cent which meant an increase of about 0.1 per cent in real terms.

By letters of 3 March 1992 they appealed as "elected representatives of the staff and individually" to the Joint Advisory Appeals Board against both the Council's decision of 20 December 1991 and the individual decisions in their pay slips.

On 3 July the Joint Advisory Appeals Board refused to make any recommendations to the Director-General on the grounds that it was not competent to review the Council's decisions.

By letters of 17 August 1992 - the decisions impugned - the Director-General rejected the appeals as irreceivable insofar as they challenged "a general decision of the Council" and as devoid of merit insofar as they challenged "individual decisions applying the Council's decision" and alleged "no breach of the Staff Rules and Regulations or individual contractual rights".

B. The complainants are impugning, first, the Director-General's decisions to reject their internal appeals as irreceivable and devoid of merit.

They contend that they did plead breach of several Rules and Regulations. What is more, the impugned decisions offend against general principles of international civil service law and commitments by CERN authorities towards the staff.

The "general" nature of the decision of 20 December 1991 was not a reason either for treating their internal appeals as irreceivable. For one thing, Article II of the Tribunal's Statute does not restrict its competence to complaints against individual decisions, and a strong line of precedent has it that "the right to impugn a decision subsumes the right to challenge the rule on which the decision is founded". So a decision may be impugned either directly or by challenging the lawfulness of the basis for it. Again, it is wrong to say that the Council's decision is unchallengeable because the Council is an inter-governmental decision-making body.

The complainants are contending, secondly, that the Council's decision of 20 December 1991 shows several flaws.

One is that neither the five-yearly salary review in 1990 nor the annual review in 1991 that preceded the impugned decision was done properly.

The Staff Association was constantly kept out of the decision-making process, though Rule VII 1.03 and Regulation R VII 1.02 require the Director-General to consult the staff on general questions concerning them. In June 1990 the Council did not endorse the Tripartite Advisory Committee's proposals but merely approved a new method of negotiating. It based its decision of 14 December 1990 not on the outcome of the negotiations in the summer of 1990, but on the Dutch motion. In the annual review for 1991 it disregarded the figure that the Administration and the Staff Association had agreed upon. By discounting the outcome of the negotiations between the

Administration and the Staff Association - after itself asking for them - the Council was in breach of the principles of good faith and stability in law.

Furthermore, the Council's vote of 20 December 1991 was improper in that it offended against Article V, paragraph 5, of the Convention for the Establishment of a European Organization for Nuclear Research by introducing the "double" majority for financial decisions.

Lastly, no reasons are stated for the general decision setting pay or for the Director-General's final decisions.

The complainants' second plea is that CERN disregarded the rules and the substantive criteria for adjusting pay which it set in 1979 and has consistently applied ever since.

They concede that the Council may set and periodically review salary scales - indeed Rule IV 1.01 says that it shall - and that it has discretion in doing so. But they maintain that once the competent authority has laid down the procedure and method to be followed in adjusting pay it is itself bound to comply. Yet three times - in 1989, 1990 and 1991 - the Council's reckoning of the salary index was utterly arbitrary and ignored the method approved in 1979. As a result the complainants have, they allege, suffered a loss of at least 6 per cent in earnings over three years. So CERN has failed in its duty to treat its staff fairly and in good faith.

They ask the Tribunal to quash the Director-General's decisions of 17 August 1992 and award them costs.

C. In its replies CERN does not challenge the receivability of the internal appeals against the individual decisions in the pay slips of January 1992. But it submits that the appeals against the Council's decision of 20 December 1991 were irreceivable under Rule VI 1.01, which says that "every member of the personnel shall have the right to appeal against any decision of the Director-General concerning himself". Furthermore, according to the Tribunal's case law, the complaints are receivable only insofar as they challenge the individual decisions applying the Council's general one. And the indirect challenge to the individual decisions applying the Council's decisions of 1989 and 1990 is out of time.

On the merits CERN submits that none of the complainants' pleas is sound.

Rule VII 1.03 and Regulation R VII 1.02 require consultation, not between Council and Staff Association, but only between Association and Director-General. So the Council's decision of 20 December 1991 was not in breach of those provisions.

When it asked the Administration on 22 June 1990 to enter into direct negotiation with the staff the Council did not relinquish its sovereign power of decision.

The Council's new rule about the "double" majority affected voting only in the Finance Committee and did not take effect until 1 January 1992.

The Council is not bound to state reasons for general decisions and the Director-General did state the reasons for his decisions of 17 August 1992.

The method of adjusting pay used since 1979 and the prescribed procedure were followed in 1992. In any event the index provided for in Regulation R IV 1.01 for the periodic salary review is not binding in law.

D. In their rejoinders the complainants state that although the Staff Association may not itself go to the Tribunal they are appealing as members of the Association to secure the enforcement of the rights of the staff as a whole. Besides, CERN has said that it would not challenge receivability on that score.

In the complainants' submission CERN is mistaken in pleading that their complaints are in part irreceivable. Rule VI 1.01 means that an administrative appeal must first be made to the Director-General against a decision by someone else. So appeal does not lie only against decisions by him. Furthermore, under Article II of its Statute the Tribunal's competence is not restricted to complaints against individual decisions.

CERN does not deny that the Council's decision may be challenged on the grounds that it affords an unlawful basis for decisions. By the same token the Council's decisions of 1989 and 1990 too may be challenged. The legal basis for the individual decisions notified on 15 January 1992 was the Council's decisions of 20 December 1991 and of the two previous years. What the complainants are challenging is not the individual decisions prior to January 1992 but the new individual one applying the Council's decisions of 1989 and 1990.

On the merits the complainants concede that the Director-General is the go-between in consultations between Council and Staff Association; but for consultations to serve any purpose the Council must be kept informed as the body empowered to make final decisions.

The Council decided to hold proper negotiations and accept in full the legal consequences of the outcome. When the proposals that came out of the negotiations were rejected the negotiations should have resumed since the Council's decision had amounted to a promise to the staff. The Council acted in bad faith and abused the staff's trust.

The Council's rule about the double majority was applied prematurely. The Council refused to endorse the Finance Committee's recommendation on the pretext that that majority had not been attained, though the decision requiring it had just been taken and was not supposed to take effect for twelve days.

The Council's decision of 14 December 1990 did not bring the five-yearly salary review to a close. The Council disregarded the outcome of the negotiations in the summer of 1990 between Administration and staff about pay rises at 1 January 1992 and 1 January 1993. There should have been further increases in 1992 and 1993, over and above the annual one, under the five-yearly review.

As for the annual adjustment for 1992, the procedure was flawed and, just to save money, the Council did not apply the proper method.

E. CERN contends in its surrejoinders that the complaints are irreceivable inasfar as the complainants are acting as staff representatives and denies ever admitting them as receivable on that score. They are further irreceivable insofar as they challenge the Council's decisions of 1989 and 1990. To challenge an individual decision a staff member may plead the unlawfulness of the general decision it rests on. But here the only general decision that affords the basis in law for the individual decisions of January 1992 is the one of 20 December 1991, and it alone may be challenged in that way. Letting the appeal lie against decisions taken years ago would impair stability in law within the Organization.

In subsidiary argument on the merits CERN submits that consultations between the Staff Association and the Council are not required in law.

The vote at the Council's meeting of December 1991 was proper; the usual rules on the simple majority were observed, though some delegations did think it odd that the matters at issue should be settled by a majority of Members that contributed but a small part of the budget.

As to the absence of a statement of reasons for the Council's decision of 20 December 1991, Articles 6 and 9 of the

Council's Rules of Procedure do not require any such statement. The reasons for the decision of 17 August 1992 were stated.

The Council's decision of 14 December 1990 did end the five-yearly salary review, as is plain from the records of its meeting of that date, and it did observe the procedure and method set in 1979.

CONSIDERATIONS:

1. The Council of CERN sets each year the rate corresponding to the "weighted average salary adjustment". On 20 December 1991, by fifteen votes to none and with one abstention, it set the rate at 5.5 per cent for 1992. Many staff, including the complainants, were unhappy with the figure, their basic salary rising by only 5.7 per cent at 1 January 1992. They filed internal appeals challenging the general decision on the average rise in pay and the individual decisions in the pay slips they got for January 1992. Their appeals went to the Joint Advisory Appeals Board, which felt that it was not competent to go into the merits. On 17 August 1992 the Director-General rejected the appeals on the grounds that they were irreceivable insofar as they were challenging a general decision by the Council and devoid of merit insofar as they were challenging the individual decisions in the pay slips.

2. The two complaints before the Tribunal are joined because they challenge the same decision and make the same pleas.

Receivability

3. The Organization contends that the complaints are irreceivable for reasons that relate to the complainants' locus standi, the nature of the impugned decisions and the thrust of the complainants' pleas.

4. What the parties have to say of the complainants' locus standi is immaterial. It is obvious - and the Organization does not demur - that as members of staff they may, subject to the bounds of the Tribunal's competence, appeal against any decision they believe to be in breach of their rights under the Staff Regulations or the terms of their appointment. They further contend that they may act as President and Vice-President of the Staff Association. On that score the Organization pleads precedents - for example Judgment 911 (in re de Padirac) - which say that staff associations do

not as such have access to the Tribunal. But the issue is immaterial since, as has just been said, the complainants may in any event act independently of their status as staff representatives.

5. They seek the quashing of the individual decisions in their pay slips for January 1992 and of the Council's decision of 20 December 1991. CERN expressly allows that the complaints are receivable insofar as the complainants challenge individual decisions that cause them injury by withholding the pay rise they claim.

6. But the Organization argued in the internal proceedings, and argues still, that the complaints are irreceivable insofar as they challenge the Council's decision of 20 December 1991. There are many precedents for holding a complaint irreceivable if it impugns a general decision against which there can be no direct internal appeal, but which must ordinarily be followed by individual decisions against which appeal does lie. Rule VI 1.01 of the CERN Staff Rules provides that "every member of the personnel shall have the right to appeal against any decision of the Director-General concerning himself". No provision of the Staff Regulations or Staff Rules says that a general decision by the Council is challengeable. So CERN is right to plead that the challenge to the Council's decision of 20 December 1991 is irreceivable.

7. Yet the complainants may still plead the unlawfulness of a general decision by the Council. Firm precedent has it - see for example Judgment 1000 (in re Clements, Patak and Rödl) of 23 January 1990 - that an international civil servant may, in challenging a decision that affects him directly, plead the unlawfulness of any general measure that affords the basis for it in law. The indisputable basis in law for the individual decisions challenged in this case is the Council's decision of 20 December 1991 setting the rate of the rise in staff pay for 1992. The conclusion is that the complainants may plead the unlawfulness of the Council's decision.

8. But the complainants go further and contend that earlier decisions by the Council adjusting staff pay broke the rules it had itself set and that such breach warrants setting aside the individual decisions now impugned. In their submission the Council overlooked in 1989 and in 1991 increases in net pay in the Swiss civil service. Again, having failed to complete the five-yearly review for which it had already set the method and aims, it made in 1991 merely "makeshift arrangements according to arbitrary criteria and in disregard of the data the method required, such as pay levels and trends in other European organisations".

9. The plea fails. If it succeeded it would mean that in a matter as delicate as setting and adjusting staff pay

appeal would lie sine die against past decisions. Every year the Council approves expenditure for the year ahead and thereby determines expenditure on staff according to the pay scales that Rule IV 1.01 of the Staff Rules empowers it to determine. By means of general five-yearly reviews and intermediate annual ones it approves each year the adjustments needed. The decision it takes each year, though based on the pay scales adopted in earlier years, fully supersedes the earlier decisions. So it is by reference to the latest of them that the lawfulness of the individual decisions in the complainants' pay slips may be determined. The complainants may plead only flaws in the Council's general decision of 20 December 1991, the sole basis in law for the decisions they are impugning.

The merits

10. The complainants' first plea is that consultations with the Staff Association are compulsory and that there were none before the five-yearly review or the annual reviews preceding the Council's decision of 20 December 1991. As was explained above, the plea is receivable only insofar as it relates to the procedure in 1991 that led to the decision of 20 December 1991.

11. Rule VII 1.03 of the Staff Rules says that "The Staff Association shall be kept informed by the Director-General on the policy of the Organization". Regulation R VII 1.01 sets up a Standing Concertation Committee as "the official joint body for information and consultation between the Director-General and the representatives of the personnel". Regulation R VII 1.02 stipulates that the Director-General "shall consult the Committee and receive its recommendations on general questions concerning the personnel". That obviously covers pay policy and proposals the Director-General puts to the Council for amending pay scales, and means, as the complainants contend, that the staff representatives must be given adequate information and allowed their say.

12. It is plain on the evidence that in this case the Standing Concertation Committee held several meetings to discuss the adjustment of pay; the Administration constantly consulted the staff representatives; and it gave fully detailed information about staff expectations to the Finance Committee at its meetings on 17 and 18 December 1990. It said:

> "After showing understanding last year for the financial difficulties of the Organization, the staff legitimately expects the approved procedures to be now fully applied. Any shortfall in the granted index would have adverse effects on the morale of the staff at a time when all energies have to be mobilised for the coming projects."

13. The Administration consulted the Staff Association, as it was required to do, and reported the results of consultations to the decision-making authorities. Although against the Association's advice the Council resolved in the end to reduce the average rise in pay, that was not because it lacked proper information on the views of the staff. On 22 June 1990 it had asked the Administration to start direct negotiations under the auspices of its own chairman with the Staff Association so as to come up with proposals that both staff and Council could accept. But that neither had the purpose, nor in law the effect, of making its decision on the matter subject to the outcome of "negotiations" with the staff or of requiring it to solicit the staff's comments on any decision it was minded to take. There is no evidence to suggest that it broke any promise by refusing to give effect to any earlier agreement, or betrayed the staff's trust, or acted in breach of the good faith an international organisation must show. In fact the purpose of the "negotiations" the Administration launched was to find proposals that both the staff and the Council could accept. But the only obligation the Council has in this area is to determine pay scales from time to time. In doing so it is not bound to agree to scales that would have satisfied the staff.

14. The complainants' second plea is that the vote in the Finance Committee, or rather the Council's understanding of it, was improper. Also on 20 December 1991 the Council decided to require for recommendations by the Finance Committee on budget and other matters a "double majority" based on the amount of Members' contributions. The new rule was not to come in until 1 January 1992. The Committee approved the Administration's proposals for pay rises by nine votes to four, with three abstentions; but the Council did not endorse that majority recommendation and the complainants suspect that it anticipated the rule that was to apply from 1 January 1992 by reckoning the majority in the Committee according to the criterion of the size of Members' contributions.

15. Though some delegates at the Council's meeting pointed out that the biggest contributors were not in the majority that had voted for the Committee's recommendation, and though they were right, there was no flaw on that account in the Council's decision. The Council alone was competent to decide, whatever the views of the Administration or the majority of the Finance Committee may have been, and it took the decision by fifteen votes to none, with one abstention.

16. The complainants' third plea is that there was no statement of the reasons for the impugned decisions. They seem to concede that it is impossible to state reasons for a pay slip and that there would be "serious practical difficulties in requiring them", but they contend that the Director-General's

decisions rejecting their internal appeals are unexplained and that the Council's decision that has prompted the dispute shows the same flaw.

17. The answer to the first point is that the text of the Director-General's decisions does state reasons. They may not have satisfied the complainants and the wording of them may be exceptionable; but they do discharge the duty that the authorities of an international organisation have to explain the reasons for rejecting a claim from a member of staff.

18. As for the Council's general decision, there was no need for the text to set out in detail the reasons why member States were limiting the average pay rise for 1992 to 5.5 per cent. The records of the prior debate - and the complainants agree those records were given due publicity - plainly disclose the Council's reasons for differing from the Administration. Besides, the Director-General told the staff in January 1992 that it had been clear from discussion with delegates on the Council that because of the current economic situation, which had recently grown worse in some member States, 5.5 per cent was the very most they could get. The Director-General went on:

> "Although our expectations were not fully met, I understand the serious reasons behind this outcome and appreciate the importance which Council attached to the need for a final decision based on a solid consensus. We are all aware of the economic problems of many countries in Europe and the rest of the world, and must bear these in mind, while not flagging in our efforts to achieve just and adequate compensation for our work."

19. Those explanations, which the complainants learned of in time to defend their interests, made it thoroughly clear what the problem was and why the Council had decided as it had, and they show that the staff were in any event kept informed of the reasons for the Council's reducing the pay rise.

20. Apart from their pleas about what they call the "external" lawfulness of the impugned decisions, the complainants maintain that CERN failed to abide by the rules and criteria it had laid down in 1979 and had since confirmed for determining annual pay adjustments.

21. The approach that CERN followed in 1991 for adjusting pay does not seem very methodical: the complainants are right on that score. But if, as it seems, they are pleading that the Council was bound to the automatic application of any particular method of adjusting pay, they are mistaken. Regulation R IV 1.01 says that "when reviewing remuneration, the Council shall use as a guide an index, the composition and method of

calculation of which it shall determine". There is no requirement that the Council follow that guide unthinkingly. Indeed the recommendations by the Finance Committee which the Council adopted in 1979 and which lay down the rules for five-yearly and annual reviews say that the criteria set for the purpose create no obligation in law. In that respect they differ from the methods that other organisations follow. CERN's sole obligations are to carry out the prescribed reviews to pay scales each year, to work out the "index" of adjustment by reference to certain factors and to propose the index to the Council, which, after consulting the Finance Committee, decides an adjustment for the year in question by reference to the index as a "guide". It may be a pity that, despite this seemingly strict method, the Organization had to resort to the compromises that the financial straits of its Members demanded; but the Tribunal holds that the Council committed no breach of any legal obligation in setting pay for 1992.

22. The conclusion is that the complainants' claims, including the claim to costs, must fail.

23. Since the complaints fail, so do the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re BANGASSER, DUNAND,
MARGUET-CUSACK and SHEERAN (No. 2)

Judgment 1330

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Paul Bangasser, Mr. Michel Eugène Dunand and Mrs. Ita Marguet-Cusack and the second complaint filed by Miss Lynette Merrilyn Sheeran against the International Labour Organisation (ILO) on 23 January 1992 and corrected on 29 April, the ILO's single reply of 3 September 1992, the complainants' rejoinder of 26 February 1993 and the Organisation's surrejoinder of 16 July 1993;

Considering the applications to intervene by:

A. Ahlborn
P. Allen
C. Antony
Y. Barras
R. Beattie
H. Bennett
J. Berset
E. Blet
J. Bonjour
A. Bonnin
F. Busson de Cortes
A. Carrizo
L. Caruso
S. Cerutti
V. Cervantes
J. Charavay
H. Chu
D. Claret
A. Clarke
H. Clément
D. Clementi
H. Cognard
R.-M. Cucchi
S. Deleuze
M. Dia
B. Diot
J.-L. Dugourd
F. Durand
R. Fairley
G. Fraize
W. Frederic
M. Ganescu
P. Garnier
M. Gautrey
R. Geiger
J.-P. Gentet
A. Gogarty
J. Gorka
C. Haeberli
J. Haeuw
S. Italici
M. Jüttner
K. Koppitz
M.-C. Laforest-Schär
C. Lagnel
M. Lastella
R. Laverriere
M. Le Prado
M. Leroy
E. Leuenberger
A. Lloyd
B. Lochon
J.-P. Lupo
C. Mannaert

M. Markwalder
G. Médecin
P. Molière
M. Molliard
A. Moranges
J.-P. Mossière
K. Narasimhan
J. Neeser
S. Peters
S. Pfenniger
J. Piccoli
B. Pillonel-Alvarez
C. Pinto de Magalhães
L. Pond
N. van Rijn
M. Rochat
F. Roche
F. Rojas-Duran
R. Sánchez-Ventura
M. Serrano
C. Smith
M. Soff
E. Sommaro
M. Stagoll
B. Stam
J. Suaton
E. Taha
H. Thomas
A. Trebilcock
C. Wilhelm
L. Wirth-Dominicé
E. Zénié

Considering Article II, paragraph 1, of the Statute of the Tribunal, Article 3.1.1, as in force up to 26 February 1991 and as amended at that date, and Articles 13.2 and 14.7 of the Staff Regulations of the International Labour Office, and Article 49 of the Regulations of the United Nations Joint Staff Pension Fund;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. From 1981 Article 3.1.1 of the ILO Staff Regulations contained a definition of "pensionable remuneration"* that was independent of the one in the Regulations of the United Nations Joint Staff Pension Fund, in which ILO staff are participants. In recent years the Tribunal has ruled on several disputes arising under Article 3.1.1 in Judgments 832 (in re Ayoub and others), 862 (in re Picard and Weder), 986 (in re Ayoub No. 2 and others), 990 (in re Cuvillier No. 3) and 1199 (in re Aguiriano and others).

As in force until this dispute arose Article 3.1.1 used to read:

> "1. For officials in the General Service category, pensionable remuneration shall be the rounded aggregate of the following:

---

* For an explanation of the term see for example Judgment 832 under A and 2.

(a) gross salary, exclusive of any allowances;

(b) the net amount of such allowances as may be pensionable under these Regulations;

(c) these scales of pensionable remuneration of the General Service category in Geneva shall be as specified [elsewhere in the Regulations].

2. The scales of pensionable remuneration of the Professional category and above shall be those specified [elsewhere in the Regulations]. These scales shall be adjusted on the same date as the scales of net remuneration of the Professional category and above serving in New York are adjusted. Such adjustment shall be by a uniform percentage equal to the weighted average percentage variation in the net remuneration, as determined by the [International Civil Service Commission], provided that the first adjustment due after 1 January 1990 under this paragraph shall be reduced by 2.8 percentage points."

By circular 461, series 6, of 14 March 1991 the ILO told its staff that the Governing Body of the International Labour Office had amended 3.1.1 with immediate effect to read:

> "Pensionable remuneration shall be determined directly by the Regulations of the United Nations Joint Staff Pension Fund."

The circular also said that the Governing Body had decided "to establish a Voluntary Thrift Benefit Fund for ILO officials".

Mr. Bangasser and Miss Sheeran belong to the Professional category and Mr. Dunand and Mrs. Marguet-Cusack to the General Service category of the ILO staff. They addressed internal "complaints" to the Director-General, within the time limit in Article 13.2 of the Staff Regulations, challenging the lawfulness of the amendment to 3.1.1 on grounds of breach of acquired rights.

On the Director-General's behalf the Director of the Personnel Department rejected their "complaints" in letters of 1 November 1991, the decisions now impugned.

B. The complainants explain why in their view the independent definition of pensionable remuneration was put in the ILO Staff Regulations. In their submission the reason was that the Organisation wanted to assume independent obligations towards its staff instead of being bound by decisions of the Fund. They give the background to the circular of 14 March 1991.

They submit that their complaints are receivable in that they are challenging what are unquestionably decisions that caused them injury. The injury is immediate in that they have forfeited an essential safeguard in law, and they will suffer further injury in the form of financial loss they cannot yet ascertain.

On the merits they have only one plea: breach of their acquired rights. That the plea is sustainable they infer, first, from the Tribunal's case law on the acquired right of ILO officials to a particular system of pensionable remuneration and, secondly, from its more general rulings on the doctrine.

First, they argue that the Tribunal's recognition of the staff's acquired right to a particular system of pensionable remuneration depends on there being in the ILO Staff Regulations - as there was in 3.1.1 - a definition of pensionable remuneration that is independent of the one in the Regulations of the Fund. So the article was the source both of the Tribunal's competence in the matter and of the acquired rights relied upon, and those rights imply an acquired right to retention in the Staff Regulations of some, albeit not a particular, independent definition of pensionable remuneration.

Secondly, citing the Tribunal's more general rulings on acquired rights, the complainants further seek to show that the decisions under challenge offend against their acquired rights on account of the nature, causes and effects of the change in the terms of their employment.

In their submission there can still be breach of their acquired rights even though that change was due to amendment of the Staff Regulations.

Though never officially imparted to the staff, the reasons for amending 3.1.1 may be gathered readily enough from the papers which have been put since 1990 to the Governing Body and its Programme, Financial and Administrative Committee, and which show that the purpose of the amendment was to avoid the consequences of independent definition.

Lastly, the complainants submit that the amendment would have far-reaching effects if the Tribunal declined to acknowledge the staff's acquired right.

First, it would deny them access to the Tribunal. In line with its case law the Tribunal will decline to affirm its own competence and will hold a complaint irreceivable if the staff regulations and rules of the defendant organisation just refer to the Fund Regulations for the definition of pensionable remuneration. So they would forfeit a basic safeguard in law, the means of redress open to ILO staff being much narrower. They reject the ILO's contention in the Governing Body committee that ILO officials would not lose all protection since the Fund Regulations vest competence in the United Nations Administrative Tribunal to hear complaints about decisions by the Board of the Fund. The Fund Regulations may - says Article 49 - be amended "without prejudice to rights to benefits acquired through contributory service prior to that date". So they protect only such rights to benefits as were acquired by payment of contributions before the date of any amendment.

The United Nations Administrative Tribunal construes strictly Article 49 of the Fund Regulations and the sort of protection its case law affords lies mainly in enforcing the rule against retroactivity. But this Tribunal's case law is not so restricted because there is nothing in the provisions about acquired rights in the ILO Staff Regulations to narrow the safeguarding of such rights to mere compliance with the rule against retroactivity. It is therefore essential for ILO staff to keep their right of appeal to this Tribunal in any dispute over pensionable remuneration.

Secondly, it is quite beside the point for the ILO to plead - as it did in the internal proceedings - that the complainants suffer no immediate material injury. It is immaterial whether setting up the Voluntary Thrift Benefit Fund is, as the Organisation makes out, an "undeniable advantage": the case at issue is about keeping the staff's right of access to the Tribunal should they in future suffer further loss in pensionable remuneration. The Staff Union never agreed that setting up the thrift fund should hinge on waiver of the right to appeal against amendment of 3.1.1.

The complainants ask the Tribunal to quash the impugned decisions and award each of them 25,000 French francs in costs.

C. In its reply the ILO gives its own account of the facts. It explains how the "independent" definition in 3.1.1 came to be put in the Staff Regulations in 1981 and describes in detail how it came to be amended. It submits that after Judgment 990 (in re Cuvillier No. 3) in particular, which at once had far-reaching financial and practical effects, the Governing Body was resolutely minded to amend 3.1.1. The only trouble was squaring the demands of the Staff Union for a supplementary pension scheme - if 3.1.1 was to go - with those of the Government members of the Governing Body, mostly hostile as they were to any policy that went beyond the ambit of the United Nations common system. Then there came the idea of a thrift fund with endowment by the Organisation. Although at first it aroused stout opposition from the Governing Body and objections from the Pension Fund and the International Civil Service Commission, in the end everyone came round, including the Staff Union, which helped in setting up the thrift fund and hailed it as a victory for the staff.

The Organisation presses the objections to receivability it raised in the internal proceedings: that there is no injury for the time being and that future injury is speculative.

Turning to the merits, it challenges the complainants' contention that they may "infer from the case law" the unlawfulness of amending 3.1.1. In its submission there are two distinct issues of law: the independence the ILO derived from 3.1.1, and the pensionable remuneration defined therein which, because the definition was an independent one, was subject to review by the Tribunal against the doctrine of acquired rights. The Tribunal's competence to declare whether a change in pensionable remuneration impaired an acquired right was attributable to the independence of 3.1.1 itself.

It was for objective reasons to do with financial and administrative difficulties that 3.1.1 was changed. The complainants' subjective view of the matter does not fit the precedents and betrays failure to grasp the meaning of the facts and principles at issue.

As for the effects of the amendment, the defendant submits that even in itself it wrought no fundamental changes in terms of employment; besides, the concomitant benefits from the thrift fund have more than made up for them.

On the first point the ILO contends that 3.1.1 has but little effect since amending it caused the complainants no immediate injury and the future injury they plead is speculative. Secondly, despite the amendment there is still judicial review, albeit different in scope, of decisions on pensionable remuneration. Since the United Nations Administrative Tribunal makes such review, the shift of jurisdiction that the amendment brings about means no foreseeable narrowing in the scope of review.

Taking up the second issue, the Organisation submits that since the new thrift fund came in with the amendment of 3.1.1 the exercise must be seen as a whole. The new fund offers tangible advantages: thanks to the Organisation's contributions and small deductions from monthly pay staff can build up a goodly lump sum that will be exempt from tax upon encashment.

D. In their rejoinder the complainants maintain that in 1981 the Organisation wanted its own obligations to remain independent by means of an independent definition of pensionable remuneration which had been in its Staff Regulations since 1961.

On its own admission what set off the process of amendment of 3.1.1 was its realising the financial impact of Judgment 990. That admission shows that this dispute arose because the Organisation wanted release from obligations that were proving expensive.

Amending 3.1.1 and setting up the thrift fund were unilateral decisions by the Governing Body: there was no agreement with the staff. Nor is there any written evidence to suggest that the waiver of staff rights under the old text of 3.1.1 was to be the consideration for getting the new fund.

On receivability the complainants maintain that they did suffer immediate material injury. All that a cause of action requires is that the impugned decision affect the complainant adversely; there need not be actual injury. As for the contention that future loss is speculative, it no longer holds water: since 1 January 1992 the pensionable remuneration of some of the complainants has, owing to a change in the reckoning of it, gone down.

They again submit on the merits that the impugned decisions infringed their acquired rights. The only reason why they are asserting an acquired right to an independent definition of pensionable remuneration in the Staff Regulations is that it affords the basis for the Tribunal's competence. There is a straightforward and clear distinction to be drawn between the purpose of the earlier complaints, which were about the level of pensionable remuneration, and that of their own, which are about keeping a crucial legal safeguard, namely review by the Tribunal.

The complainants press their pleas about the case law on acquired rights. As to the reasons for the amendment they point out that though the Organisation speaks of the financial and administrative difficulties of having an independent definition of pensionable remuneration, it offers no figures to bear out that it could not afford one.

As for the effects of the amendment, they submit that ILO staff rightly want to keep the possibility of review by a tribunal that knows the Organisation well, since pensionable remuneration is an essential feature of the terms of their employment.

E. In its surrejoinder the Organisation points again to the three criteria the case law uses to determine whether there is breach of acquired rights: the nature of the employment conditions that have changed and of the acquired right being claimed; the reasons for the change; and the effect of recognising or not recognising the acquired right.

On the first criterion it contends that there is no inferring from precedent an acquired right to an independent definition of pensionable remuneration. Even though the one in 3.1.1 was what vested competence in the Tribunal that did not make it an acquired right.

On the second criterion the ILO argues that the complainants belittle the financial reasons for the amendment and that their pleas on the issue are contrived and inconsistent. The Organisation was not trying to save money. What was troubling it was the financial consequences of having to cope with the differences in pensionable remuneration and the fortuitous delays that were likely to occur because it had to amend the Staff Regulations every time there was a change. Being part of the United Nations common system, the ILO sees keeping the old text of 3.1.1 in the same light as the Tribunal saw, in Judgment 1239 (in re Baeumer, Claus and Hansson), the continuance of former Article 3.1 bis of the Staff Regulations of the World Intellectual Property Organization.

On the third criterion the ILO again affirms that there was no immediate material injury and that future losses are hypothetical. Some officials may be unhappy with the changes that review of the present basis of pensionable remuneration may bring, but the amendment of 3.1.1 did not, for all that, rob them of means of redress. The complainants are not, it seems, denying that the case law of the United Nations Tribunal is much akin to this Tribunal's. So the sole purpose of the complaint is to keep the right to go to two different tribunals.

As for the reasons for setting up of the thrift fund, insofar as the amendment made no fundamental changes in the conditions of service, there was no strict need in law to "offset" it. Although there was no negotiation in the context of the Staff Regulations about the new fund or any legal agreement to set it up, it was something without precedent in the annals of an international organisation in that for the first time the governing body of such an organisation was directly involved in discussion and told the Director-General how far he might go. The Director-General reminded the government representatives that they could not in all fairness refuse an endowment in exchange for loss of the independent definition in 3.1.1. So the thrift fund was indeed seen as a sort of *quid pro quo* for the amendment.

CONSIDERATIONS:

1. The United Nations Joint Staff Pension Fund provides benefits in the event of retirement, death or disability for the staff of the United Nations and the other organisations admitted to membership. Pension entitlements are determined by reference to an amount that is defined in the Regulations of the Fund as "pensionable remuneration". The staff regulations of all the organisations refer to the definition in the Fund Regulations, but only recently has such reference appeared in the Staff Regulations of the International Labour Office. On 26 February 1991 the Governing Body of the Office amended Article 3.1.1 of the Staff Regulations, which is about the pension entitlements of staff in the several categories, to read:

> "Pensionable remuneration shall be determined directly by the Regulations of the United Nations Joint Staff Pension Fund."

2. The ILO announced the new wording to the staff by a circular of 14 March 1991. It superseded forthwith the earlier text. By reproducing the provisions of the Fund Regulations without express reference thereto, that text had reflected the ILO's view that it was not bound in law by the amendments the Fund decided upon and its wish to keep a degree of independence within the system. By amending Article 3.1.1 it surrendered that independence. Members of staff in the various categories, including the complainants, saw the amendment as offending against their acquired rights and they filed internal "complaints" against the application to them of the new text. The Director of the Personnel Department rejected their "complaints" on behalf of the Director-General by decisions dated 1 November 1991, and they want the quashing of those decisions.

Receivability

3. In the ILO's submission the complaints are irreceivable. For one thing - it argues - since the old text of 3.1.1 used to import the scales in force under the Fund Regulations the amendment did not make any new scale of pensionable remuneration applicable to the complainants. For another, though the amendment divests the Tribunal of competence to hear disputes on the subject, it does not impair any legal safeguard they enjoy under the express terms of their appointment and cannot therefore cause them any actionable injury. Thirdly, they have failed to show that the new method of setting pensionable remuneration is bound in future to cause them such injury: the future losses they fear are merely speculative.

4. The ILO's objections fail. According to the Tribunal's case law receivability does not depend on proving actual and certain injury. All that a complainant need show is that the decision under challenge may impair the rights and safeguards that an international civil servant claims under staff regulations or contract of employment. In this case - and whatever the ruling on the merits may be - the amendment the complainants are objecting to obviously affects the way of reckoning the contributions to be docked from their monthly pay, their pension entitlements and the remedies at their disposal for ensuring observance of their acquired rights in the matter. It is something that may cause them injury and it is indisputably actionable even if, as the defendant says, the actual injury due to the amendment is not yet ascertainable.

The merits

5. The complainants explain at length how the ILO authorities came, though somewhat loath, to give up their independent power to determine pensionable remuneration. They then contend that the amendment of Article 3.1.1 impaired the acquired rights that the Tribunal has always sought to safeguard, for example by Judgments 832 of 5 June 1987 (in re Ayoub and others) and 986 of 23 November 1989 (in re Ayoub and others No. 2).

6. The case law sets forth the principles the Tribunal will abide by in ruling on this case and indeed both sides acknowledge them. The "acquired rights" of ILO staff are inviolate according to Article 14.7 of the Staff Regulations and the general principles which the Tribunal has affirmed and enforced. But it is neither the purpose nor the effect of safeguarding acquired rights to arrest every staff member's position in all aspects of relations with the employing organisation up to the date of expiry of appointment, nor to "freeze" the text of the Staff Regulations. Such a freeze would anyway be at odds with the fast-evolving trends that international organisations have to cope with nowadays. Though contracts do ordinarily engender acquired rights - as was held in Judgments 832 and 986, to cite but two - the staff may not plead that amending the material provisions of Staff Regulations and Staff Rules amounts to breach of such rights unless the amendment bears on some fundamental and essential term of appointment. Precedent also has it that in entertaining a plea of that kind the Tribunal must look into the causes and effects of the challenged amendment to the Staff Regulations to see whether it does amount to breach of acquired rights.

7. What then were the reasons for the amendment challenged here? The complainants' case is that there is no objective cause and justification for it. In their submission

the ILO just wanted to evade the consequences of having in 1981 asserted a degree of autonomy and of having failed to foresee properly how far the Tribunal's rulings, among other things, would take it. There was discussion about how to amend the old text of 3.1.1 and the records show that the reasons for forgoing an independent definition of pensionable remuneration were objective, not a wish to impair the staff's interests and rights. It was hard to carry on having a joint body that links all the United Nations agencies administer pensions and another body altogether set the rates of contribution and amounts of benefits. One approach is to have close links with the common system by means of decisions of the ILO authorities that merely take over automatically any amendments approved by the Fund. That is how things were done up to the date of the challenged amendment, but the ILO ran a risk of delay or error that it might in the end find harmful to its own interests. The alternative is for it to free itself altogether from the Fund scales. But of course that it must do at its own expense, the Fund being under no duty to pay benefits - possibly not fully funded - that would make for disparity between different groups of participants. Since ILO member States seem never to have countenanced the second alternative and the whole idea of supplementary pension schemes is at variance with the concepts underlying the Fund, the conclusion is that there was nothing improper about the reasons for the amendment of 3.1.1.

8. The complainants' second plea is that the effects of that amendment upset essential terms of their appointment. For the time being the scale of pensionable remuneration has not altered on account of the amendment. And as to the future there is every reason to suppose - considering the financial difficulties that the ILO would face if it pursued a wilful policy of discarding the Fund's own scales - that the Organisation will as in the past be applying the same rates as do other international organisations. One of the main effects of the amendment is to narrow access to the Tribunal, which has declined competence to hear complaints about the pension entitlements of the staff of organisations whose rules merely refer to the Fund Regulations for the definition of pensionable remuneration. The Tribunal appreciates the confidence its rulings arouse in complainants who see them as especially protective of acquired rights. But it cannot treat an amendment to the rules on competence as "loss of an essential legal safeguard". After all, with the new text competence goes to an independent and impartial international administrative tribunal. And - to make one further point the defendant brings out in its surrejoinder - appeals about staff pay still lie to this Tribunal.

9. Last comes the complainants' contention that any amendment of a text that in itself confers an acquired right by safeguarding an independent definition of pensionable

remuneration is bound to amount to impairment of that right. That is a nice point but it is mistaken. No provision of the Staff Regulations is in itself inviolate. Indeed the complainants acknowledge as much. Only when an amendment to earlier provisions has altered some essential and fundamental term of appointment will there be breach of an acquired right. But here, as was said above, neither the reasons for the amendment nor the effects of it warrant treating it as such breach. Although international civil servants are entitled to have the conditions for setting pensions decided in line with the relevant general principles, they may not demand that the rules about who is competent to determine pensionable remuneration remain the same forever.

10. The conclusion is that amending 3.1.1 did not impair the complainants' acquired rights. Besides, any disadvantages there may be in applying the standards of the common system to ILO staff are offset on the best possible terms by the establishment of a thrift fund with a big capital endowment. Though the creation of the thrift fund was distinct in law from the amendment, it was approved at the same time and is an earnest of the ILO's good faith and wish to play fair.

11. The written submissions having shed full light on the material issues, there is no need for hearings.

12. Since the complaints fail on the grounds set out above, so too do the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

SEVENTY-SIXTH SESSION

In re ROGGIERO Judgment 1331

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mrs. Silvia Roggiero against the Pan American Health Organization (PAHO) on 12 March 1993 and corrected on 22 April, PAHO's reply of 2 July, the complainant's rejoinder of 26 August and the Organization's surrejoinder of 21 September 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and the PAHO Staff Rules;

Considering the application filed by Miss Marta O'Brien-Goldie on 27 April 1993 to intervene in the complaint;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follow:

A. The complainant, a citizen of Ecuador who was born in 1948, joined the staff of the PAHO on 7 September 1982 under a six-month temporary contract as a secretary at grade G.5. In August 1983 the Organization appointed her to a secretarial post at the same grade. In January 1991 it transferred her to a post as office assistant, again at G.5.

On 30 August 1990 it issued notice of a vacant post, No. 5441, for a G.6 secretary in its Office of Information and Public Affairs (DPI). It invited applications by a deadline it set at first at 20 September and later at 19 October. The complainant applied on 6 September. The intervenor, Miss Marta O'Brien-Goldie also applied for the post.

A Selection Committee of five members was set up to make a recommendation for appointment and met on 3 July 1991. It voted by four to one in favour of appointing another applicant, Miss Verónica Garrido, who was already performing the duties of the post. On 25 July the Personnel Department informed the complainant that Miss Garrido had been appointed.

The complainant filed an appeal on 29 August 1991. In its report of 8 September 1992 the Headquarters Board of Appeal held that since Miss Garrido "did not meet all the minimum requirements" the selection should be declared void and the post advertised again.

In a letter of 11 December 1992 the Director of the PAHO told the complainant that though he disagreed with the premise upon which the Board of Appeal had made its recommendations, he had, because of "the noticeable delay" in convening the Selection Committee, asked the Department of Personnel to review the description of the post, re-advertise the vacancy and convene a new selection committee. The post description having been revised, the post was re-advertised on 27 January 1993. The complainant and Miss Garrido again applied.

She filed this complaint on 12 March impugning the Director's decision not to cancel Miss Garrido's appointment.

By a memorandum of 10 May 1993 the Chief of Personnel told Miss Garrido that on the Director's instructions her appointment had been cancelled but that she would continue to perform the duties provisionally. By a letter of 11 June the Chief of Personnel informed her that, a second Selection Committee having "submitted its recommendations to the Administration", she was again appointed to the post as from 1 June 1993.

B. The complainant has two main pleas.

The first is that to judge from Miss Garrido's personal history form as submitted to the first Selection Committee she fails to meet the minimum qualifications for the post as announced. That was also the opinion of the Board of Appeal and of the dissenting member of the first Selection Committee. Although the Director disagreed, his letter of 11 December 1992 does not say why.

The second plea is that the first Selection Committee followed the wrong criteria. The representative of the DPI told the Selection Committee that most of the actual duties were different from those stated in the vacancy notice. If that were so, the process of selection should have been stopped at once since it was based on misrepresentation.

The complainant seeks the cancellation of Miss Garrido's appointment, resumption of the process of selection and awards of damages for moral injury and costs.

C. In its reply the PAHO observes that after she filed her complaint it did what the complainant is now asking for. As he explained in his letter of 11 December 1992 to the complainant, the Director instructed Personnel to repeat the selection procedure: he asked it "to review the post description for Post 5441, re-advertise the post, and convene a new ad hoc Selection Committee". He thereby cancelled the appointment of Miss Garrido, although, as was both logical and lawful, she continued to discharge the duties temporarily.

Besides, the Organization need not answer the complainant's challenge to the first selection procedure because by entering the second competition she tacitly acknowledged the lawfulness of the Director's action.

Her claim to moral damages is groundless because she affords no evidence of suffering attributable to delay in the first process of selection.

D. In her rejoinder the complainant objects to the PAHO's reading of the facts and presses her claims. She contends that the Director never cancelled the appointment of Miss Garrido. Three "Authorized Post Summaries" issued after the Director's purported cancellation of it showed Miss Garrido to be still on post 5441. The second Selection Committee made the same mistakes as the first: it recommended a candidate whose records revealed that she was not up to the minimum requirements, and it preferred her on the strength of an allegation by the Chief of the DPI that the post was not just secretarial, i.e. that it was not as described in the announcement of vacancy. So there has not yet been any proper process of selection.

E. In its surrejoinder the PAHO contends that the complainant is not properly distinguishing between incumbency and temporary assignment. The successful candidate was not the incumbent of the post: she was put on it temporarily after the Director had cancelled the first selection process and her appointment. The second Selection Committee, like the first, took the view that the successful candidate was qualified for the post.

CONSIDERATIONS:

1. On 30 August 1990 the PAHO issued a vacancy notice inviting applications for a grade G.6 post as a secretary in its Office of Information and Public Affairs (DPI). It set the following minimum requirements of education and experience:

> "Graduation from secondary school with additional secretarial courses and not less than three years of experience in secretarial work, including experience with the use of computer terminals or microcomputers for data processing, or
>
> graduation from secondary school with not less than five years of experience performing secretarial duties in an international environment, including experience with the use of computer terminals or microcomputers for data processing."

The applicants included the complainant, the intervenor and Miss Verónica Garrido, who had joined the Organization in September 1988 as an office assistant.

2. A Selection Committee having met on 3 July 1991, a majority of four recommended appointing Miss Garrido. The one dissenting member took the view that Miss Garrido did not satisfy the stated minimum requirements of "additional secretarial courses" and "three years of experience in secretarial work". According to the Committee's report the Chief of the DPI too was in favour of Miss Garrido. She was thereupon appointed to the post.

3. The outcome of the complainant's appeal to the Board of Appeal is set out under A above. In a letter of 11 December 1992 the Director told her that he believed the Board to be mistaken in concluding that Miss Garrido did not meet the minimum requirements. Yet, acknowledging "noticeable delay" in convening the Selection Committee, he said that he was ordering the Department of Personnel "to review the post description ... re-advertise the post, and convene a new ... Selection Committee". Although he did not expressly declare the impugned selection to be void, the Organization contends that "thus, he voided the appointment" of Miss Garrido.

4. Another notice of vacancy went out on 27 January 1993 with some changes in the list of duties and minimum requirements. The applicants again included the complainant and Miss Garrido.

5. In her complaint, filed on 12 March 1993 pending the outcome of the second process of selection, the complainant submits that the Director has never declared Miss Garrido's appointment void, that she is still holding the post and that the second Selection Committee has not met. She is impugning the Director's decision of 11 December 1992 and her claims are as set out at the end of B above.

6. In its reply to the complaint the PAHO says that although in the Director's view Miss Garrido did meet the minimum requirements for the post he ordered a new process of selection. "In the meantime" - says the Organization - "Miss Garrido was informed that the selection had been declared null and void and that she was to continue to perform the duties of post 5441 on a provisional basis". The Chief of Personnel gave Miss Garrido that information in a memorandum of 10 May 1993. The second Selection Committee met on 2 June 1993 and recommended Miss Garrido, who was thereupon duly appointed to the post. In the PAHO's submission the complainant has thus already obtained the two main remedies she seeks from the Tribunal, namely the cancellation of the original appointment of Miss Garrido and resumption of the process of selection.

7. The complainant's answer in her rejoinder is to reaffirm that Miss Garrido's original appointment was never declared void and to contend that the second process of selection is as flawed as the first. She argues in particular that Miss Garrido's records as made available to the Selection Committee showed that she did not meet the minimum requirements even by the date of the re-advertisement of the post and that the second Selection Committee acted improperly by using information it had informally obtained from Miss Garrido by telephone during its meetings about courses she had taken to supplement her training.

8. According to Miss Garrido's curriculum vitae at the time of the first process of selection she had not taken any additional secretarial courses and did not have the three years' secretarial experience. Indeed the Organization has not contended that she did have those qualifications. The Tribunal is satisfied that the Board was correct in concluding that Miss Garrido did not satisfy the minimum requirements for the post. In the letter of 11 December 1992 that is the impugned decision the Director stated no reason for disagreeing with that view. He committed a mistake of fact by simply asserting, without explanation, that the premise on which the Board had based its recommendations was wrong. The complainant is therefore entitled to the cancellation of the selection and appointment of Miss Garrido and to a new competition and a new

selection process, to be carried out on the same terms and conditions as the first.

9. The Organization is further mistaken in its plea that the Tribunal should not order such relief because the complainant has already obtained it. The Director did not expressly declare the selection of Miss Garrido to be void; the Organization's pleadings rest on the assumption that she was selected and appointed to the post after the first selection process; and there is no written evidence prior to 10 May 1993 to show that the Organization told Miss Garrido - or indeed anyone else - that it had cancelled her appointment and that she was to hold the post only provisionally. What is more, the Director ordered a review of the post description and it was done, so that the second competition was not held on the same terms and conditions as the first. Lastly, the Director attributed his decision to order a new process of selection to "noticeable delay" in the process of selection, not to the reason relied on by the complainant, which was Miss Garrido's ineligibility - borne out by the Board of Appeal - at the closing date for the first competition. In the circumstances the conclusion is that the Organization has not granted the complainant the remedies she seeks.

10. The PAHO further pleads that by participating in the second process of selection the complainant acquiesced in the Director's decision of 11 December 1992 and was not free to challenge the selection of Miss Garrido unless she presented "a new claim concerning the new selection procedure". The plea again fails. By making an application in response to the second notice of vacancy the complainant was quite properly seeking to obtain redress, in the form of selection to the advertised post, from the Organization itself. Not having obtained redress within the prescribed period of appeal, she was entitled to come to the Tribunal in pursuit of it.

11. The impugned decision is in two parts. The first part - the declaration that Miss Garrido was qualified - was flawed for the reasons already stated; the second part - the decision that the post description must be reviewed because of the delay in the selection process - is also flawed because the delay was not a valid reason for such review.

12. The Director's decision of 11 December 1992 must therefore be quashed, the post re-advertised on the terms of the notice of 30 August 1990, and a new process of selection held. The second selection process, being a consequence of that decision, is null and void.

13. On account of the undue delay in the selection process the Tribunal awards the complainant damages for moral injury in a sum of 1,000 United States dollars. She is also entitled to $3,000 in costs.

14. The Organization has not challenged the right of Miss O'Brien-Goldie as another applicant for the post to intervene in the complaint. Her intervention is allowed but since she has failed to show any moral injury she is not awarded any sum under that head.

DECISION:

For the above reasons,

1. The Director's decision of 11 December 1992, and the subsequent selection and appointment of Miss Garrido, are quashed.
2. The Organization shall re-advertise post 5441 on the terms stated in the vacancy notice of 30 August 1990 and shall hold a new process of selection.
3. It shall pay the complainant $1,000 in damages for moral injury.
4. It shall pay her $3,000 in costs.
5. The application to intervene is allowed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal Mr. Edilbert Razafindralambo, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

E. Razafindralambo

Mark Fernando

A.B. Gardner

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re MERMIER (No. 2) Judgment 1332

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Noël Mermier against the European Organization for Nuclear Research (CERN) on 18 December 1992, CERN's reply of 22 March 1993, the complainant's rejoinder of 29 April and the Organization's surrejoinder of 2 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Regulations R II 1.19 and R II 6.02 of the CERN Staff Rules and Regulations;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts material to this case and an account of the complainant's career appear in Judgment 1185 of 15 July 1992 under A. His first complaint, on which that judgment ruled, challenged a decision of 9 July 1991 not to grant him an indefinite appointment or renew his fixed-term one. The Tribunal set that decision aside, sent the case back to the Organization for review of his claims and made him a provisional award of an amount equivalent to three months' remuneration "pending final settlement".

On 28 July 1992 the complainant sent a letter to the Director-General in which, inferring from the judgment that he was still a staff member pending a new decision, he asked what the procedure would be for the review of his case.

The Director-General answered on 31 July 1992 that the Tribunal's ordering review of his contractual status did "not mean reinstatement in the meantime as a staff member" and the Personnel Division would be informing him as soon as possible of the procedure for review.

On 20 August 1992 he was paid the three months' compensation and the costs awarded by the Tribunal.

In a memorandum of 23 September 1992 the Leader of the Personnel Division recommended against renewing his fixed-term appointment.

In a letter of 29 September 1992 the Director-General informed the complainant of the decision not to grant him an indefinite appointment and not to renew his appointment that had expired on 31 January 1992. Appended to the letter was a note of 21 May 1991 from the Leader of the ST Division, in which the complainant worked, saying that his performance failed to meet three of the four main criteria stated in Administrative Circular No. 9. The Indefinite Appointment Review Board had approved the note on 5 July 1991 and confirmed its view on 18 September 1992.

The Director-General's letter of 29 September 1992 is the decision under challenge.

B. The complainant submits first that the decision was unlawful. It was founded on the note which the Leader of the ST Division wrote on 21 May 1991 for the previous indefinite appointment review. Although the Tribunal did not explicitly say so, the review of his case plainly required resuming the procedure from the start. Yet he had no interview with the leader of his division and was not told of the proposed recommendation before it went to the Indefinite Appointment Review Board. Furthermore, the impugned decision was taken long after July 1992, when the Board was due to complete the review.

Secondly, the complainant contends that Judgment 1185 was not properly executed. As in 1991 the Organization again failed to explain why it was not renewing his appointment, though the judgment was clear on that score. The Tribunal also said that CERN was to "review ... the complainant's claims", which meant re-examining all the evidence available in July 1991. It did not do so.

He presses the pleas he put forward in his first complaint. The review of his case was premature: according to CERN practice indefinite appointments are not granted to anyone with less than the nine years' service mentioned in paragraph 2 of Regulation R II 1.19. His supervisors found his work satisfactory, as was plain from his division leader's opinion of 22 August 1990. But on 21 May 1991 the division leader made a "sudden switch" in the course of the review for 1991 after the complainant sent him a memorandum refusing for reasons of safety to perform certain duties.

CERN has in this case made the same allegations of failure to meet the criteria in circular No.9 as those that prompted the decision of 9 July 1991. The decision of 29 September 1992 amounts to abuse of authority because the Director-General has overlooked the arguments in his memorandum of 7 December 1990. It also amounts to a sanction.

Under Regulation R II 6.02 CERN must give at least six months' notice of non-renewal of a fixed-term contract. The complainant got no such notice.

He presses all the claims he made in his first complaint and asks the Tribunal to quash the decision of 29 September 1992, order his reinstatement as from the date of expiry of his appointment and award him a fair sum in damages for material and moral injury, payment of interest on the amounts due and costs.

C. In its reply CERN submits that the complainant's pleas are devoid of merit.

It denies that the decision of 29 September 1992 was unlawful: it did review the complainant's case as ordered in Judgment 1185 but since there were no new facts it had no choice but to cite the reasons underlying its decision of 9 July 1991.

The argument that it failed to observe the date for completion of the indefinite appointment review for 1992 is irrelevant: Judgment 1185 was delivered on 15 July 1992 and so it carried out the review within a reasonable period.

All the authorities competent to review his case stated reasons for not renewing his fixed-term appointment. So the procedure was in line with the Tribunal's ruling.

The complainant is misreading Regulation R II 1.19: it does not preclude the award of an indefinite appointment to someone with under nine years' service.

He is wrong to accuse the division leader of a "sudden switch": the leader based his view on - among other things - two refusals by the complainant of work assignments towards the end of 1990.

It is the decision of 29 September 1992 that is at issue, not the one of 9 July 1991. The pleas the complainant put forward in his first complaint are immaterial to this one because CERN did carry out a review.

There was no abuse of authority and the refusal to grant him an indefinite appointment or renew his fixed-term appointment was no sanction. His performance was found to be below par and by twice refusing jobs he marred the atmosphere at work.

As to his claim to moral damages, CERN paid him unemployment benefit in accordance with the rules and helped him to look for other employment.

CERN did give him notice, on 9 July 1991, that it would not extend his appointment beyond 31 January 1992, and since the decision of 29 September 1992 merely confirmed the reasons for the earlier one there was no need to give him notice. So his claim to damages under that head is unfounded.

D. The complainant submits in his rejoinder that even if the decision of 29 September 1992 was lawful Judgment 1185 was not properly executed. The Tribunal thereby held that he was entitled to compensation equivalent to the salary due from 31 January 1992 to 30 September 1992, the date of the final settlement. Compensation for the six months' notice prescribed in Regulation R II 6.02 should have been added to those eight months, but was not.

Although there were only facts prior to 31 January 1992 for CERN to consider in reviewing his case that was because by refusing to extend his appointment beyond that date it allowed itself no time for the review. What is more, it does not deny that there was no further discussion between him and his supervisor.

As for the allegation that the pleas in his first complaint are irrelevant to the second one, the decision of 29 September 1992 was taken for the same reasons as the earlier one.

CERN's efforts to find him a new job were not a favour but a right.

Lastly, he maintains that CERN failed to give him the six months' notice and that it began on 29 September 1992, the Tribunal having quashed the earlier decision.

E. In its surrejoinder CERN asserts that it made the complainant all the payments ordered in Judgment 1185 and does not owe him compensation equivalent to his pay from 31 January to 29 September 1992.

CERN presses its plea about notice and submits that it was under no duty to extend his fixed-term contract to allow time for review of its refusal of an indefinite appointment.

CONSIDERATIONS:

1. CERN used to employ the complainant in its ST Division as an electricity technician at grade 7. By Judgment 1185 of 15 July 1992 the Tribunal set aside a decision of 9 July 1991 neither to grant him an indefinite appointment nor to renew his fixed-term one from 31 January 1992. The Tribunal sent his case back to the Organization for review. Since he had to leave CERN at the end of the last extension of his appointment, at 31 January 1992, the Tribunal ordered the Organization to pay him a provisional award of an amount equivalent to three months' remuneration pending final settlement.

2. In answer to a request the complainant had put on 28 July 1992 the Director-General said that he had told the Personnel Division to execute Judgment 1185. By a memorandum of 8 September 1992 the Leader of the ST Division suggested upholding the decision neither to renew the complainant's appointment nor to grant him an indefinite one. In a memorandum of 18 September 1992 the Convenor of the Indefinite Appointment Review Board told the Director-General that the Board was confirming the recommendation it had made in 1991. The complainant is impugning the Director-General's decision of 29 September 1992 to endorse that recommendation.

The alleged procedural flaws

3. In the complainant's submission the serious procedural flaws in the decision of 29 September 1992 are that CERN failed to "review" his case: he had no "further conversation" with the leader of his division and he was not asked to comment on the outcome of the review.

4. The plea fails. For one thing, it is an irrelevant question for him to ask exactly how far the review by CERN was supposed to go after the quashing of the decision of 9 July 1991. What is beyond question is that the Organization was required to take a new decision on his claims as they were up to the date of the quashed decision. So CERN had to consider the question of granting him an indefinite appointment in 1991 in keeping with the set procedure. As set out in CERN's weekly news bulletin 10/91 of 4 March 1991 that procedure did not require any meeting between candidates and their division leaders. So there was no breach of the review procedure for 1991.

The alleged breach of good faith

5. The complainant charges the Organization with refusing to extend his appointment despite his supervisors' favourable assessment of his performance.

He contends that the Director-General's announcement of 17 December 1990 was tantamount to a promise which good faith required him to keep.

6. The sole purpose of the Director-General's announcement to a staff assembly on 17 December 1990 was to notify the individual decisions he had taken earlier, including the one of 22 October 1990 about the complainant's case and the postponement of other cases to 1991. The only promise he then made was to review those cases in 1991, and in respect of the complainant, whose case was reviewed in that year, he kept it.

The alleged disregard of essential facts and misappraisal of the facts

7. The complainant alleges that CERN overlooked several essential facts: the opinion of his first-level supervisor, which CERN discarded in favour of the inconsistent appraisals of the leader of his division; his eight years' fine service, which earned him two promotions and two extensions of appointment; and his actual working conditions as described in his memorandum of 7 December 1990.

8. The complainant's objections have more to do with appraisal than with any disregard of the evidence. The leader of his division went into all of those facts in the note which he wrote on 21 May 1991 in the context of the procedure for the grant of indefinite appointments and which prompted the impugned decision of 29 September 1992. The division leader cited the opinion of the group the complainant belonged to, and by the same token the favourable assessment of him by his first-level supervisor: "the group had no difficulty" with him, his technical know-how went "beyond the 1990 requirements", and he had been promoted to grade 7. In an obvious allusion to the complainant's memorandum of 7 December 1990 the leader also said that 1990 had been a "turning point" in the complainant's behaviour. There is therefore no substance to the plea that essential facts were neglected.

9. So at best the complainant may plead misappraisal of the evidence, and he does so under another head. He objects in particular to the inconsistency of the recommendations the leader of his division made about him on 22 August 1990 and 21 May 1991 and to the Director-General's taking account only of the later one, which was to his detriment.

10. It is true that the Director-General's decision, being discretionary, is subject to limited review by the Tribunal and may be set aside for example if he obviously misconstrued the facts. But he did not. The division leader changed his mind, not arbitrarily, but on account of a change in the complainant's own behaviour as reported in the division leader's note of 27 March 1991 in the following terms:

> "... we have suddenly met in the course of the past seven months a very non-cooperative, if not to say obstructive attitude, which has hampered the program of work."

The plea of misappraisal is not proven.

The alleged lack of reasons for the decision and the plea of abuse of procedure

11. In the complainant's submission the decision not to extend his appointment was substantiated by reference to criteria that should have applied only to the conversion of the nature of an appointment. There was therefore an abuse of the procedure.

12. He is mistaken. The decision not to extend the complainant's fixed-term appointment reads:

> "... the question of renewal ... was also discussed with your supervisors in the ST Division. Their opinion was unfavourable for the same reasons as those set out in the ... appraisal of 21 May 1991: reservations about your behaviour, adaptability and team spirit."

Such reasons suffice in law to warrant the impugned decision, even if given in the course of the procedure for the grant of indefinite appointments, provided that there is no evidence of any flaw in that procedure. The complainant is saying that CERN failed to abide by its own rules - the ones it set in circular No. 9 of November 1990 - by declining to take all the material evidence into account. But, as CERN observes, the circular merely concerns the substantive conditions for the grant of an indefinite appointment and the rules of procedure are in bulletin 10/91 of 4 March 1991. There is no reason to suppose that the board set up ad hoc to review the candidates' records based its recommendations to the Director-General on incomplete evidence.

The charge of abuse of authority

13. The complainant argues that by endorsing those recommendations the Director-General showed prejudice against him and committed an abuse of authority by making his alleged

uncooperativeness a pretext for refusal of both the renewal and the grant of an indefinite appointment and by imposing on him a covert disciplinary sanction without first bringing disciplinary proceedings.

14. CERN was under no duty to bring disciplinary proceedings against the complainant if the allegations about him did not in its view so warrant. Under the circumstances the decision to terminate his appointment "at the end of the prescribed period" under Regulation R II 6.02 did not amount to a sanction.

Partial failure to execute Judgment 1185

15. Lastly, the complainant pleads failure by the Director-General to discharge all his obligations under Judgment 1185.

16. On that score he succeeds. The effect of quashing the decision of 9 July 1991 was to restore the *status quo ante*, and in particular to cancel the notice that CERN gave him of termination at 31 January 1992. He left CERN at that date and the Director-General has again refused to renew his appointment. So there must be a decision on his terminal entitlements.

17. First, since the Organization failed to give him the six months' notice due under Regulation R II 6.02 of the decision not to extend his fixed-term appointment from 1 February 1992, he must be deemed to have remained in CERN's employ from that date until he received the new decision dated 29 September. He got it the next day. But from any arrears of pay due to him must be subtracted the amount of the provisional award by the Tribunal.

18. Moreover, according to the Regulations the Organization ought to have notified to him its decision of 29 September not to renew his appointment six months before the date of expiry. He is therefore entitled to an award of compensation corresponding to six months' notice, including social benefits.

19. Since his main claim to quashing fails so does his claim to moral damages. But he is entitled to payment of interest on the sums due and to an award towards costs.

DECISION:

For the above reasons,

1. The complaint is dismissed insofar as it seeks the quashing of the decision of 29 September 1992.

2. CERN shall, in execution of Judgment 1185, pay the complainant his remuneration from 1 February to 30 September 1992 and compensation corresponding to six months' notice, less any amounts paid to him of the kind stated in 17 above, plus interest at the rate of 10 per cent a year from the dates at which the sums fell due up to the date of payment.

3. The Organization shall pay him 2,000 Swiss francs towards costs.

4. His other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda P. Pescatore E. Razafindralambo

A.B. Gardner

SEVENTY-SIXTH SESSION

In re FRANKS (No. 2) and
VOLLERING (No. 2)

Judgment 1333

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Nigel Malcolm Franks against the European Patent Organisation (EPO) on 2 April 1993, the EPO's reply of 14 June, the complainant's rejoinder of 15 September and the Organisation's letter of 29 September 1993 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering the second complaint filed by Mr. Johannes Petrus Geertruda Vollering against the EPO on 12 March 1993 and corrected on 1 April, the EPO's reply of 14 June, the complainant's rejoinder of 15 September and the Organisation's letter of 29 September 1993 informing the Registrar that it did not wish to enter a surrejoinder;

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

Considering the application of 23 September 1993 by Mr. Steven Derek Cook to intervene in Mr. Vollering's complaint and the EPO's comments thereon of 4 November 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 17, paragraph 2, of the Rules of Court and Articles 56(4), 64(2), 65, 67 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The EPO employs the complainants as patent examiners in Directorate-General 1 (DG1) at The Hague. They each have three dependent children and receive family allowances under Article 67 of the Service Regulations. On 11 December 1991 they took part in a strike of EPO staff. They learned from supplementary pay slips for February 1992 that on that account the Administration had deducted one-thirtieth of their total monthly pay, including not just basic salary but also their allowances.

In letters dated 3 March they asked the President of the Office to pay back the amounts deducted against their family allowances or else treat their letters as appeals under Article 108 of the Service Regulations. In a letter of 29 June 1992 the Director of Staff Policy informed Mr. Vollering that the President had referred his case and others - among them Mr. Franks' - to the Appeals Committee as a "collective appeal". In its report of 2 November the Committee unanimously recommended allowing the appeal, but by a letter of 5 January 1993, the impugned decision, the President rejected it.

B. The complainants submit that the deductions are in breach of the Service Regulations and general principles of law and amount to covert disciplinary action. They have the following main pleas.

Asserting the precedence of general principles of the international civil service over the Service Regulations, they cite first the Organisation's duty of care towards its employees and their dependants. Though the staff's right to strike is, they maintain, "balanced" by the Administration's right to deduct basic salary for each day of strike action, the balance is disturbed when allowances too are withheld.

They allege, secondly, breach of the "fundamental" right to social security, as embodied in the Universal Declaration of Human Rights and the International Labour Organisation's Social Security (Minimum Standards) Convention, 1952 (No. 102). In Article 67(2) of the Service Regulations, which precludes concurrent payment of allowances of like nature, the EPO acknowledges that allowances are not amounts paid in proportion to services rendered. If they were there would be no need for such a rule. Allowances from the EPO being comparable to those that member States provide, the Organisation may not suspend payment whenever a staff member goes on strike: that would deprive his family of the social protection which the EPO owes its permanent employees much as a government owes protection to citizens.

Their third plea is breach of equal treatment. Since 1978 the EPO has been setting against family allowances any amounts officials and their spouses have received in child allowance from the Dutch Government (the *kinderbijslag*). But the complainants, whose wives do not receive Dutch child allowances, fare less well than any official whose spouse does get such an allowance, which a strike at the EPO does not affect. Among the other examples of discriminatory treatment they cite are cases where both parents are employed by the EPO: if the one who receives family allowance does not go on strike the EPO will pay it whether or not the other parent goes on strike too.

Their final plea turns on the construction to be put on Article 65(1) b) and c), which reads as follows:

> "b) Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths ...
>
> c) Where entitlement to any of the allowances provided for in Article 67 commences after the date of entering the service, the employee shall receive such allowance from the first day of the month in which such entitlement commences. On cessation of such entitlement the employee shall receive the sum due up to the last day of the month in which entitlement ceases."

In the absence of special provisions on strikes the material rule is 65(1) c), which means that allowances are to be paid for the full month in which entitlement begins or ends. Since Article 64(2) says that "remuneration shall comprise basic salary and, where appropriate, any allowances" the words "where appropriate" allow the EPO to exclude allowances from the scope of 65(1) b). So any deductions against the allowances are tantamount to covert disciplinary action.

The complainants' claims are that the Tribunal quash the impugned decisions, order repayment to them of any deductions made against the allowances on account of strike action, plus payment of interest thereon at the rate of 10 per cent a year, and award each of them moral damages in the amount of 7,000 guilders plus 303 for each of their children. Mr. Vollering also seeks an award of 20,000 guilders in costs.

C. In its replies to the complaints the EPO submits that the answer to the complainants' pleas is already to be found in the case law. In Judgment 566 (in re Berte and Beslier) the Tribunal held that Article 65 applied "whatever the reason for the official's absence", since it does not provide for any exception. Judgment 1041 (in re Lammineur), which was about deductions against allowances for strike action, held that "remuneration" in 65(1) b) denotes "both basic salary and allowances" and ruled that there was "nothing to suggest that allowances are not subject to the thirtieths rule that applies under 65(1) b) to all forms of 'remuneration'" since the only purpose of 65(1) c) was to "determine entitlement to allowances when such entitlement is to cease ... and when such entitlement 'commences after the date of entering the service'".

In the absence of any special provision governing strikes it is the general rule on deductions in the event of absence that applies. Since that rule applies to basic salary and allowances alike there is no question of disciplinary action, nor is the deduction so "serious" as to destroy the balance between the EPO's and its officials' rights and duties. To assume that the Tribunal overlooked general principles of law when it delivered Judgment 1041 is to plead a mistake of law.

The Tribunal presumably took account of any fundamental rights, such as equal treatment, that are embodied in the human rights instruments that the complainants rely on. In any event the EPO is not bound by such instruments.

Those who get the Dutch child allowance and officials eligible for EPO family allowance are not in the same position in fact and in law. Since the complainants' wives are not permanent employees of the EPO their arguments raise "theoretical" questions beyond the scope of the complaints.

The EPO's interpretation of Article 65(1) b) and c) is the one endorsed in Judgment 1041: 65(1) c) covers the special case and may not override the general rule in 65(1) b). There is no ambiguity in 64(2), which defines "remuneration" to include allowances whenever an official is entitled to any, "where appropriate".

D. In their rejoinders the complainants press their earlier pleas. In their submission Judgment 1041 was flawed because the Tribunal did not have all the material evidence before it. That the deductions are discriminatory is especially plain in the event of a long strike: should a strike last for a whole month families who depend on the EPO for social protection would get no benefits - or for that matter salary - whatsoever. The complainants also allege breach of the principle by which the level of salary and allowances should be such as to attract the most highly qualified officials, since the EPO's practice offers less favourable conditions than those on offer in the Organisation's member States. Is not the protection of fundamental rights in human rights instruments part of the general principles of law that govern the international civil service?

CONSIDERATIONS:

1. On 11 December 1991 the complainants took part in a one-day strike of EPO staff at The Hague. Supplementary pay slips for February 1992 showed that the EPO had made deductions from their pay for that day at the rate of one-thirtieth of the monthly rates and that it had applied the deductions to all

items of their pay, including the allowances they were entitled to under the Service Regulations. They thereupon appealed on the grounds that the EPO should have made the deductions only against their basic salary, not total pay including those allowances.

2. Their collective appeal was referred to the internal Appeals Committee, which reported on 2 November 1992. The Committee declared itself not competent to entertain their first claim, which was that it should "ignore the ILO Judgment 1041" on the grounds of "an error of law". As to their second claim, which was that it should "pronounce on the nature of the allowances", it unanimously recommended allowing the appeal and repaying the amounts deducted. The grounds it gave were that for the EPO to stop payment of the allowances as well would upset the balance between the staff's right to go on strike and the employer's right to deduct salary on that account and "would amount to an unjustified sanction in case of a legal exercise of a fundamental right". But in a letter dated 5 January 1993 to Mr. Vollering the President of EPO Office said that he was rejecting the appeal "in view of the clear case law on the subject". That is the decision the complainants are impugning.

3. The sole substantive issue in this case is whether the Organisation acted properly in deducting amounts from the complainants' pay in respect of their allowances because they had taken part in the strike of 11 December 1991. But that is the very issue that the Tribunal ruled upon in Judgment 1041 (in re Lammineur) of 26 June 1990. In that judgment the Tribunal made, under 3, a detailed analysis of the material provisions of the Service Regulations - Articles 56(4) and 65(1) b) and c) - rejected the complainant's interpretation of them and accordingly dismissed his case as devoid of merit, for the reasons set out in 4. The pleas that the present complainants are putting forward are in essence the same and must fail for the same reasons, which there is no need to repeat here.

4. The complainants further plead breach of basic rights and of general principles of law which, in their submission, amounts to covert disciplinary action in that "the administration is not allowed to take special measures which are not provided for in the Service Regulations".

5. That plea too is unsound. First, for the reasons already stated in Judgment 1041, the deduction of sums against the complainants' allowances is lawful under the Service Regulations, and the taking by the Organisation of a decision that the Regulations allowed cannot in the circumstances of the case constitute an unlawful act. Secondly, the complainants are mistaken in seeing deduction of their allowances as a

breach of basic rights and general principles of law. The law that the Tribunal applies in entertaining claims that are put to it includes not just the written rules of the defendant organisation but the general principles of law and basic human rights. The ruling in Judgment 1041 that the EPO acted lawfully in making deductions against the allowances in the event of strike therefore implied that in doing so it was not offending against any general principle of law or basic human right. Again the complainants' plea fails.

6. One of the principles that the complainants allege that the EPO acted in breach of is that of equal treatment. Although what is said in 5 above holds good for that as for any other general principle of law, they dwell on the issue of equality at some length and the Tribunal therefore deals with it in rather greater detail below.

7. The complainants plead four breaches of the principle. The first arises out of the payment of the Dutch State child allowance known as the kinderbijslag to certain EPO staff members or their spouses. They point out that the EPO considers the Dutch child allowance to be "of like nature" to the EPO family allowance, and that is why it applies the rule against accumulation of the two benefits in Article 67(2) of the Service Regulations. They themselves and their spouses do not receive the Dutch child allowance. So in the event of a strike they fare less well than EPO staff and their spouses who do receive it since the complainants suffer the deduction against the EPO allowance whereas the others preserve full entitlement to the Dutch child allowance. They conclude that families of EPO staff members are therefore being differently treated.

8. The Organisation's answer is that, though the Dutch child allowance and the family allowance paid by EPO are indeed "of like nature", that is "immaterial" to the question at issue. In its submission the Dutch allowance is "an integral part of national legislation in the Netherlands", whereas the "issue in the present case is the application of the special provisions governing permanent employees of the European Patent Office as set out in the Service Regulations".

9. The EPO's position is correct. Its employees whose families do receive the Dutch child allowance are not in the same position in law as those who receive the EPO family allowance, the source of the benefit not being the same. Since the principle of equal treatment applies only where staff members are in the same position in law, there is no breach of it in the present instance.

10. Secondly, the complainants plead "the case of unequal treatment which arises in the situation where both husband and wife are employed by EPO". Since their wives are not employed in the Organisation no analogy may be drawn between their own position and the situation on which they rely, and therefore the principle of equality does not apply.

11. Thirdly, the complainants contend that there is further discrimination in the event of strike between full-time EPO employees like themselves and part-time employees in that the latter will continue to receive in full any allowance they may be entitled to. As the Organisation points out in its replies, however, if any part-time employee "chooses to go on strike he is of course treated in the same way as his colleagues working full time and one-thirtieth of all his allowances is deducted for each day on strike". The conclusion is that there is no breach of the principle of equality between full-time and part-time employees.

12. Fourthly, and lastly, the complainants allege breach of equality in the payment of education allowance. But the EPO made no deductions from their pay on account of that allowance. The plea fails because they have no cause of action.

13. Mr. Cook has applied to intervene in Mr. Vollering's complaint in accordance with Article 17(2) of the Rules of Court on the grounds that his rights will be affected by the Tribunal's judgment. Insofar as he is seeking the "annulment" of Judgment 1041 and the resumption of proceedings on an internal appeal his claims go beyond the scope of Mr. Vollering's and are therefore irreceivable. Insofar as his claims concur with Mr. Vollering's his intervention is receivable but is rejected on the grounds set out above.

DECISION:

For the above reasons,

The complaints and the application to intervene in Mr. Vollering's complaint are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

E. Razafindralambo

Michel Gentot

International Labour Organisation
Administrative Tribunal
Geneva

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL   INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF   *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re ABRAHAM, POPPINGER and RONESCH (Nos. 1 and 2)

Judgment 1334

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Julius Abraham, Mr. Alfred Poppinger and Mr. Karl Ronesch against the International Atomic Energy Agency (IAEA) on 7 December 1992 and corrected on 22 January 1993, the IAEA's replies of 2 April, the complainants' rejoinders of 9 September and the Agency's surrejoinders of 3 November 1993;

Considering the second complaints filed by Mr. Abraham, Mr. Poppinger and Mr. Ronesch against the Agency on 7 December 1992 and corrected on 22 January 1993, the IAEA's replies filed on 2 April, the complainants' rejoinders of 9 September and the IAEA's surrejoinders of 3 November 1993;

Considering the Agency's further submissions of 20 October 1993 in reply to questions put to it on 28 September on the Tribunal's behalf and the complainants' comments thereon of 16 November 1993;

Considering the applications filed to intervene in both sets of complaints by:

H. Aigner
G. Bagliano
J. Berger
E. Bollmann
S. Deron
D. Donohue
N. Doubek
R. Fiedler
G. Grabmüller
G. Hemmer
G. Jammet
E. Lobner
A. Nirschl
R. Ouvrard
J. Parus
W. Raab
C. Resch
V. Vorisek
P. Zahradnik
A. Zoigner

Considering the applications filed to intervene in the second set of complaints by:

R. Hartmann
J. Heiss
R. Hochmann

Considering Articles II, paragraph 5, and VII, paragraphs 1, 2 and 3, of the Statute of the Tribunal, Regulations 1.01 and 1.02 and Rules 1.02.2, 12.01.1(D)(1) and 12.02.1(B) of the IAEA's Provisional Staff Regulations and Staff Rules;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are officials of the IAEA in the General Service category. They work in the Agency's Safeguards Analytical Laboratory at Seibersdorf, some twenty miles outside Vienna.

Under an agreement the IAEA signed with the Austrian Government in 1976 it was to keep teams ready at all hours to deal with emergencies. Since 1980 each team has been made up of three officials, who must be on call by telephone or radio at any time for a full week, Saturdays, Sundays and public holidays included. Such weeks are known as "on-call" duty and used to be remunerated at flat rates. In 1991 the rate for a full week was 5,534 schillings. Originally staff had to stay near the telephone, and they saw that as a drastic check on their freedom of movement. Later the Agency gave them pagers.

The complainants and others did such work. They learned that the Agency was to do away with flat-rate payment on 1 January 1992 and instead pay compensation only for overtime hours. In a memorandum of 16 December 1991 they proposed to the Director of the Division of Personnel a provisional solution whereby they would get compensatory leave for on-call duty "until normal financial conditions are restored".

In a memorandum of 20 January 1992 the Director told the complainants and others of the Director General's decision to do away with lump-sum compensation and instead pay overtime rates for emergency services actually rendered. The reason was, he said, that the use of pagers warranted review of the method of payment; there were also budgetary considerations, and the staff of other organisations in Vienna were not being paid for on-call duty.

By letters dated 19 March 1992 the complainants submitted to the Director General requests for review under Rule 12.01.1 (D)(1) alleging breach of the rule against retroactivity, of acquired rights, of basic principles on pay and of equality of treatment. They applied for leave to go straight to the Tribunal.

In letters of 15 April 1992 the Director General rejected their requests but said he would bring in the new arrangements only as from 20 January 1992, the date on which they had had notice of it, and would invite proposals about compensation in the form of "time-off on a limited scale" for on-call duty.

On 20 May the complainants went to the Joint Appeals Committee. The Committee having failed to report within the time limit in the rules, the complainants applied to the Director General in letters of 18 September for leave to go to the Tribunal. In letters of 16 October he gave them such leave but upheld his decision to pay only for actual overtime done while on call. Those are the decisions they are impugning in their first complaints.

Meanwhile the Director General approved new on-call arrangements granting staff one day off for each week on call plus payment at the overtime rates in Rule 1.02.2 for emergency service. On 18 August 1992 the complainants were informed that the new arrangements had come in as at 1 July.

In letters of 21 and 31 August 1992 the complainants submitted a further request for review to the Director General. They observed that the new arrangements for pay were not so good as the ones brought in in 1976 and they applied for leave to appeal to the Tribunal if he declined to review his decision. He gave them leave in letters of 9 September 1992 in which he also refused to reconsider his decision to bring in the new arrangements at 1 July 1992. Those are the decisions they are challenging in their second complaints.

B. In their first complaints the complainants plead breach of acquired rights. They say that the new arrangements for compensation have meant lower earnings in 1992 than in 1991: Mr. Abraham has earned 18.32, Mr. Poppinger 20.29 and Mr. Ronesch 6.30 per cent less. That is a change in the fundamental and essential terms of their employment.

In their submission the new arrangements are also in breach of general principles of law on pay. The Agency seems to be treating on-call duty as no more than emergency service and thereby ignoring how it restricts freedom of movement and the right to time off. Refusing to pay for work done outside ordinary working hours offends against the general principle of law that services must be paid for as their nature requires and when rendered.

Moreover, according to the "Fleming" principle that applies to the Agency and the rest of the United Nations common system, pay of staff in the General Service category must match the best prevailing conditions in the locality. The complainants' pay has not since 20 January 1992.

Lastly, they allege breach of equal treatment. The Agency should have applied the new arrangements that came in at 20 January 1992 to everyone who does on-call duty, but it went on paying the staff of the Division of Nuclear Safety according to the old arrangements.

In their second complaints they acknowledge that their average loss of earnings is one-third less than what they alleged in their first complaints, now that on-call duty is compensated by one day off for each week. But the Agency is setting the rate of pay for such duty improperly low: by their reckoning it should in 1991 have granted them about three days off for each week on call. So their pleas about breach of acquired rights and of the general principles of law on pay hold good.

But they are dropping the plea about breach of equal treatment because the arrangements introduced on 1 July 1992 appear to apply to everyone on call.

In their first complaints they ask the Tribunal to quash the decisions of 16 October 1992, to order the Agency to pay them as from 20 January 1992 amounts reckoned according to the arrangements for pay in force up to that date, and to award them 20,000 French francs each in costs.

In their second complaints they ask the Tribunal to quash the decisions of 9 September 1992, to order the Agency to pay them as from 1 July 1992, amounts reckoned according to the arrangements for pay in force up to 20 January 1992, and to award them 20,000 French francs each in costs.

C. In its replies the Agency submits that the first complaints are irreceivable. The Director General's letters of 16 October 1992 authorising the complainants to go directly to the Tribunal are not the right decisions for them to challenge if the complaints are to be receivable. They appealed on 20 May 1992 against the Director General's decision of 15 April 1992. On 5 August they wrote to the Secretary of the Joint Appeals Committee to say they were surprised to have got no answer. They could have challenged implied rejection under

Article VII(3) of the Statute of the Tribunal, the Committee having failed to report in time; but instead they waited until 18 September to ask the Director General for leave to go straight to the Tribunal. The complaints filed on 7 December 1992 are therefore not receivable.

On the merits of the first complaints the Agency points out that the flat-rate arrangements introduced in 1976 were just provisional: neither the Staff Regulations and Rules nor the complainants' contracts expressly provided for them. Besides, they applied only to the Seibersdorf Laboratory.

Originally staff on call had to be within reach by telephone, but then came the pagers, which are not much of an inconvenience. Emergencies being very rare, the staff were compensated merely for being on call. Staff have special obligations under Regulation 1.02, which says that "the whole time of staff members shall be at the disposal of the Director General". There is no breach of general principles of law if pay and work time are reduced together.

The Fleming principle applies only to general levels of pay and does not require comparison of every single term of employment at the Agency with the same term on the local labour market.

The payments made to the staff of the Division of Nuclear Safety from March to June 1992 were made by mistake; so there was no breach of equal treatment.

In replying to the second complaints the Agency denies breach of acquired rights: it was the complainants' own memorandum of 16 December 1991 to the Director General that suggested replacing cash payments provisionally with compensatory time off. And they have actually taken the time off due to them. Since their loss of earnings may not be regarded as fundamental, their terms of employment have not altered. The Agency maintains its arguments about the reasons for the changes in their terms of appointment and the provisional and non-monetary nature of compensation.

It points out that both aspects of on-call duty are properly compensated: constant availability by one day off for each week, and emergency service by overtime payment under Regulation 1.02.2.

D. In their rejoinders the complainants challenge the Agency's plea that their first complaints are irreceivable and submit that Article VII(3) of the Tribunal's Statute does not apply to internal appeals. They say that if they had followed the course the defendant is suggesting the Tribunal would certainly have dismissed their complaints as premature.

On the merits they submit that the payment for on-call duty was part of their salary. The Agency never questioned the principle of such compensation before it took the decisions under challenge, and it may not allege that it was provisional now that it is written into their terms of appointment. Besides, there are other instruments that govern officials' conditions of employment, such as directives, decisions, international treaties and the general principles of law.

They maintain that the Agency should have paid them a flat rate for on-call duty and overtime rates for emergency service. Notwithstanding Regulation 1.02 the constraints of such duty do warrant compensation. Furthermore, the Agency has not shortened the number of hours on call and carrying pagers is a real constraint.

What the Agency says about the Fleming principle is at odds with the "revised general methodology for surveys of best prevailing conditions of service at headquarters duty stations", approved by the International Civil Service Commission, which provides for establishing general scales on the strength of comparison of the various components of pay.

In rejoinders to their second complaints the complainants maintain their plea of breach of acquired rights. Their proposal of 16 December 1991 was meant only as a makeshift and they never suggested any arrangements like those the Agency later adopted. Although they have indeed taken the leave due to them they have expressly reserved their rights.

E. In its surrejoinders on the first complaints the Agency develops its pleas.

It points out that since the complainants did not take part in the on-call system from the outset they may not plead breach of acquired rights on the grounds that it was in operation from 1976 to 1992. The lack of a proper legal basis for payment of the compensation - which is not mentioned in their contracts, the Regulations and Rules, the Agency's "directives", or any international treaty applying to the Agency - was one of the reasons for changing the arrangements in force up to 20 January 1992. Contrary to their assertions, compensation for on-call duty was claimed on separate payment requests and did not go through the Agency's payroll system.

The Agency observes that it has never accepted the figures of loss of earnings submitted by the complainants and maintains that they have failed to prove that the new arrangements for compensation have altered their terms of employment.

It presses its pleas about the Fleming principle and maintains that there was no breach of general principles of law on pay.

In its surrejoinders on the second complaints it submits that the complainants and other staff concerned were at all times involved in drawing up the new arrangements. The staff actually proposed in the memorandum of 16 December 1991 compensation by time off rather than pay for on-call duty.

The new arrangements which came into effect on 1 July 1992 have reduced pay for such duty to a reasonable level.

F. In further submissions the IAEA explains that the system of on-call duty came about through an agreement with the Austrian Government. It has never had to impose on-call duty on anyone since enough staff members have always volunteered. In 1991 eight of the interveners did not carry out such duty. On the abolition of monetary compensation for on-call duty the Administration decided in June 1992 to give everyone an equal share of on-call duty. Between 1987 and 1991 the average number of weeks a year the complainants spent on call was 9.8 for Mr. Abraham, 8 for Mr. Poppinger and 5.6 for Mr. Ronesch. In 1991 Mr. Abraham and Mr. Poppinger were on call more often than others.

G. In comments on the Agency's further submissions the complainants observe that (1) on-call duty never depended on individual preferences; (2) how many weeks staff members spent on call depended entirely on the Agency's requirements; (3) on-call duty had always been regarded as a part of their jobs even before it was written into their job descriptions in 1992; and (4) the material figures for 1992 and 1993 do not show any change. Since Mr. Poppinger was on call only after September 1987 his case is not comparable for that year. From 1988 to 1991 he and Mr. Abraham each had an average of 10 weeks a year and Mr. Ronesch 5.25.

CONSIDERATIONS:

1. The complainants and the interveners are officials of the International Atomic Energy Agency and in charge of safety and control at the Safeguards Analytical Laboratory which the Agency has at Seibersdorf not far from its headquarters in Vienna. The complaints seek the quashing of two successive

decisions in 1992 whereby the Director General changed arrangements originally made in 1976 to compensate staff for the constraint of ensuring round-the-clock surveillance of safety at the Laboratory.

2. Material to the Tribunal's rulings are the issues of fact set out below, the evidence for them being either in the parties' briefs or in their answers to questions the Tribunal put to them in the course of the proceedings.

3. In 1980, when the Agency transferred the Laboratory with other technical plant to Seibersdorf, it set up teams to be ready round the clock to deal with emergencies. The teams were each made up of three members of the Agency's technical staff and they were all to be on call by rotation for a week at a time.

4. The members of the teams were paid compensation for such "on-call" duty and the amount was from the outset aligned with rates of payment for like duty with municipal industrial services in Vienna. In the early days it came to some 2,000 schillings a week; but it went up in 1987 to about 4,000 and was thereafter indexed to pay rises.

5. The system worked smoothly and to the satisfaction of the staff who - says the Agency - ran it on their own. It ranged, they reckon, from roughly 5 to 20 per cent of their total earnings. Since there were many volunteers on-call duty was infrequent and accounted for 5 to 10 weeks a year. There was little or no emergency work.

6. Although on-call duty was particularly burdensome at first it became easier with the use of pagers. But by common consent it is still an inconvenience: the official must stay within a radius of nearly 40 miles from the Laboratory; keep clear of tunnels, undergrounds and reinforced concrete structures that block radio waves; get in touch with the Laboratory by telephone within ten minutes of being paged; and be constantly ready to report for duty, if need be, within the hour.

7. In 1988 management ordered an audit of the arrangements, apparently for two reasons, the introduction of the pagers and the need to rationalise the Agency's services to cope with grave financial difficulties. The evidence shows that several possibilities were considered in the review: having security guards on permanent duty (an idea that was soon dropped because of the cost); granting compensation, at overtime rates, only for services actually rendered; and allowing compensatory time off instead of extra pay for on-call duty, despite the risk it would create of disrupting ordinary services.

8. The staff concerned were involved in the audit and there was disagreement on the subject at various levels of management. The upshot was that the staff learned from a memorandum dated 20 January 1992 that the Director General had decided to do away with the system of extra pay for on-call duty; that henceforth the only form of compensation would be payment at overtime rates for services actually rendered; and that job descriptions would refer to on-call duty. So that the new arrangements should not be retroactive they came into effect on 20 January 1992. The Administration waited until 6 May 1992 to change the post descriptions: it added under the heading "Major Duties" the words "Perform on-call duties, including the wearing of a radiopager, as requested by the supervisor".

9. The intermediate arrangements announced in the memorandum of 20 January 1992 prompted strong protest from the staff concerned. On 19 March 1992 they sent to the Director General requests for review under Rule 12.01.1 (D)(1) of the Agency's Provisional Staff Rules. Though the Director General rejected their requests by letters of 15 April 1992, he told them at the same time that he was considering whether to replace financial compensation for on-call duty with compensatory time off.

10. The complainants thereupon appealed, on 20 May 1992, to the Joint Appeals Committee.

11. In line with what the Director General had suggested in his letters of 15 April 1992 and under cover of a memorandum of 22 June 1992, the Director of the Division of Personnel sent the Director of the Laboratory and the Director of the Division of Nuclear Safety a document dated 29 May 1992 on the new on-call arrangements that were to apply as from 1 July at the Laboratory at Seibersdorf. The document explained how on-call duty was organised and what sort of obligations it laid on staff. According to paragraph 18 of that document, for one week of such duty a staff member was to get one day off. According to paragraph 19 emergency service rendered outside normal working hours was to be paid at the standard overtime rates. Paragraph 20 said that the Administration would get as many qualified staff as possible to take part by rotation so as to lessen the burden for each of them and any disruption of the Agency's ordinary work. The acting Directors of the Laboratory and of the Division of Nuclear Safety communicated that document to the on-call staff by a memorandum of 18 August 1992.

12. The complainants made requests for review of that new decision in letters they sent to the Director General on 21 and 31 August 1992. The Director General rejected them too by decisions of 9 September 1992.

13. Meanwhile the complainants came to the view that the Joint Appeals Committee was unable to function properly and that management was dilatory in playing its part in the adversarial proceedings. Prompted by a fear that its dilatoriness might deny them fair process they applied again to the Director General for leave to go directly to the Tribunal under Rule 12.02.1(B). He gave leave as to both sets of appeals: for the later ones in the letter actually rejecting them and for the earlier ones in a letter of 16 October 1992.

14. On 7 December 1992 the complainants filed two sets of complaints. Both sets are the same in substance save that one set follows the first request for review and is about the intermediate arrangements that were in effect from 20 January to 30 June 1992, and the other is about the arrangements brought in on 1 July 1992. Since the two complaints are inextricably connected they are joined to form the subject of a single judgment. The applications to intervene listed above are declared receivable.

15. The complainants have two pleas. The first is that the successive changes in the on-call system were in breach of their acquired rights as embodied in the arrangements for financial compensation in effect up to 20 January 1992. Their second plea is that the various arrangements in effect since the beginning of 1992 are unlawful and infringe general principles of administrative law, such as fair financial reward for services rendered, and the Fleming principle, which requires that the pay of locally recruited staff be on a par with the best prevailing conditions in the locality. They seek restoration of the former arrangements as from 20 January 1992.

16. The Agency pleads irreceivability. In its submission, since the complainants waived their right to lodge internal appeals with the Joint Appeals Committee the time limit in Article VII(2) of the Tribunal's Statute should run from the date on which they got notification of the decisions they are objecting to. By that reckoning the time limit ran out long before 7 December 1992, the date of filing.

17. On the merits the IAEA submits that the change in the arrangements for compensating on-call duty was not in breach of any acquired right since the arrangements brought in in 1976 were and continued to be provisional and not a component of salary. So the later changes in them had no effect on any essential term of the complainants' appointments. In answer to their plea about the general principles of administrative law the Agency refers to the duty of staff members under Regulations 1.01 and 1.02 to carry out any duties assigned to them and to put all of their time at the disposal of the Director General. It maintains that the Fleming principle is immaterial on the grounds that its purpose is to establish general levels

of pay not to require comparison between particular benefits other than pay. Lastly, the Agency denies discriminating against anyone: though it did, owing to an administrative mistake, continue to pay compensation after 20 January 1992 to some staff the arrangements it introduced on 1 July 1992 have applied to everyone concerned. The IAEA therefore asks the Tribunal to dismiss the complaints.

Receivability

18. The Agency's objection to receivability rests on a misreading of Article VII of the Tribunal's Statute. Article VII(1) says that "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".

19. The complainants filed two successive requests for review under the Staff Rules. The first request was rejected, and thereupon the matter went to the Joint Appeals Committee and was left pending. The second request was rejected in letters of 9 September 1992, and it was in those letters that the Director General gave leave for direct appeal to the Tribunal. In his letters of 16 October 1992 he gave further leave for direct appeal in the first case.

20. Those then are the dates by which the complainants "exhausted" the internal remedies, as Article VII(1) requires, and so it is the notification of the letters bearing those dates that set off the time limit of ninety days in VII(2). Having been filed before expiry of that time limit, both sets of complaints are plainly receivable.

The merits

The alleged breach of acquired rights and the Fleming principle

21. On the strength of an acquired right the complainants claim restoration of the arrangements for financial compensation for on-call duty as they were before the changes made on 20 January 1992. Under this head they rely on the case law on the doctrine of acquired rights, particularly Judgments 391 (in re de Los Cobos and Wenger), 832 (in re Ayoub and others) and 986 (in re Ayoub No. 2 and others). The plea they base on the Fleming principle comes under the same head.

22. The doctrine of acquired rights is irrelevant to this case. The purpose of the case law the complainants cite is to safeguard the substance of the staff's pay and pensions in the

event of amendments to the material rules. The supplementary benefits were intended to afford compensation for constraints that at the time were not part of the complainants' ordinary duties. The abolition of such benefits did not affect the level of their basic pay.

23. Another material point is that only benefits that have some basis in law may be protected under the doctrine of acquired rights. It is plain on the evidence that the financial compensation paid for on-call duty was the outcome of shifting administrative practice which as such was constantly subject to change and had no basis in the Staff Regulations or terms of employment. No issue may arise in such circumstances over the safeguard of acquired rights.

24. As for the Fleming principle, it offers, as the defendant says, a guide for setting general levels of pay for local staff: it offers no basis for claims about any particular component of such pay.

25. The conclusion is that the complainants' pleas under this head fail.

The alleged breach of general principles of administrative law

26. Yet some of the other arguments which the complainants put forward or which the facts or evidence before the Tribunal suggest, and in particular the doubts expressed about the lawfulness of the impugned decisions, warrant setting them aside.

27. But before taking up those issues the Tribunal must make it plain that it will not interfere in the Agency's exercise of its discretion to determine the sort of additional duties or constraints that earn special compensation over and above the payment of salary for the performance of normal duties. Nor, if the Agency believes special compensation to be warranted, will the Tribunal, save in obviously anomalous cases, rule on the form such compensation should take or the arrangements for granting it.

28. The decision of 20 January 1992 alters the arrangements for on-call duty in two ways: it replaces all forms of compensation for being on call with changes in post descriptions. Subject to the criteria set out above the Tribunal holds that that decision is at odds with the most rudimentary requirements of administrative process. Although it amounts to an alteration of the position of the officials concerned, the decision fails to afford certain safeguards that make such alterations lawful. There is no reference to the basis for it

in law; there is no explanation of how the decision maker derived his authority; and there is no suggestion that the staff were consulted in a manner prescribed in the Staff Regulations. Lastly, the decision does not say which staff members it applies to and so it allows for discrimination. Such discrimination has indeed already occurred.

29. The Tribunal does not require of the Agency the sort of strict attention to form that might bring its work to a standstill, but will require scrupulous observance of forms and procedures that protect staff interests in any administration that is lawfully managed and subject to proper review.

30. It is true that the arrangements in the document dated 29 May 1992 are more explicit than the earlier scheme insofar as for the first time that document sets out the on-call arrangements in full. But like the earlier scheme it fails to state the basis in law and to define the staff it applies to, and by implication takes for granted acceptance of the constraints demanded of staff by dint of a revision of their post descriptions, which the Tribunal has held to be improper.

31. The conclusion is that the impugned decisions must all be set aside together with the intermediate arrangements of 20 January 1992, including the revision of post descriptions, and the decisions of 18 August 1992 applying new arrangements to the complainants as from 1 July 1992. The cases are all sent back to the Agency for a new decision that complies with the requirements stated in this judgment.

32. The Tribunal declares the consequences of the quashing to be as follows. The arrangements for compensation in force up to 20 January 1992 are provisionally reinstated pending the introduction of new ones, save that for the period from 1 July 1992 up to the date of this judgment the effects of the arrangements brought in by the decisions of 18 August 1992 shall be deemed final.

33. Since their claims have in the main succeeded the complainants are entitled to costs, and the Tribunal sets the amount at a lump-sum total of 20,000 French francs.

34. The applications to intervene being allowed, the interveners shall have the same rights as the complainants insofar as they are in the same position in law and in fact.

DECISION:

For the above reasons,

1. The impugned decisions and the arrangements referred to in 31 above are set aside, with the consequences set out in 32 above.
2. The Agency shall pay the complainants a total of 20,000 French francs in costs.
3. The interveners shall have the same rights as the complainants insofar as they are in the same position in law and in fact.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda P. Pescatore Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re MADINGAR (No. 2) Judgment 1335

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Jérôme Alngar Madingar against the World Health Organization (WHO) on 27 January 1993, the WHO's reply of 25 March, the complainant's rejoinder of 27 April and the WHO's surrejoinder of 2 June 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, WHO Staff Rules 630.2, 630.8, 830.1, 1040, 1050, 1060, 1070, 1230.1.1 and 1230.1.3 and WHO Manual paragraph II.12.550;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Chad who was born in 1949, was employed by the WHO from 13 July 1988 as a consultant administrative officer at grade P.2, initially for two months. The Organization sent him to Kinshasa to take charge of administrative preparations for a project in Zaire which the Organization was to execute for the United Nations Development Programme (UNDP). His appointment was extended by three months as from 12 September 1988.

Before joining the WHO he had worked as an assistant with the United Nations Volunteers in the UNDP's office in the Comoros.

By a memorandum of 8 December 1988 the WHO's Representative in Zaire told him that his consultancy appointment, which was to expire on 11 December, could not be extended. He tried in vain to get the WHO's Regional Director in Brazzaville to review the decision of 8 December 1988, but by a memorandum of 28 December a personnel officer told him on the Regional Director's behalf that his appointment would be extended to 11 January 1989.

On 22 March 1989 he filed his first complaint with the Tribunal seeking the quashing of the decision of 8 December 1988 and reinstatement in his post or an equivalent one or, failing that, awards of material and moral damages for wrongful termination and of costs. He withdrew that complaint on 5 September 1989 and the Tribunal recorded the withdrawal of suit in a judgment of 23 January 1990.

Meanwhile he had appealed on 12 January 1990 to the WHO's regional Board of Appeal against the decision of 8 December 1988. He sought the quashing of the decision not to renew his appointment; reinstatement in the same project and the same post or, failing that, in another project or department in an equivalent or more senior post; and payment of his entitlements and damages.

In its report of 20 July 1990 the Regional Board recommended that the Regional Director should, if possible, consider granting him a similar post. By a letter of 12 February 1991 the Regional Director offered him employment in a similar post at grade P.2 for eleven months. In his reply of 26 February to the Regional Director the complainant observed that the post should be graded P.3 at least and that the letter said nothing of his entitlements and of damages.

In a letter to him of 6 May 1991 the personnel officer confirmed on the Regional Director's behalf that the available post was graded P.2 and said that the Regional Board had made no recommendation about paying entitlements and damages.

In a letter of 17 December 1991 he filed an appeal with the headquarters Board of Appeal against the decision taken on 6 May 1991 on the Regional Director's behalf.

In its report of 3 September 1992 the Board recommended confirming the Regional Director's offer but raising the grade to P.3 and paying him his terminal entitlements and damages equivalent to the amount of his salary from 12 January 1989 to 12 February 1991.

The Director-General informed the complainant in a letter of 20 October 1992 that he was confirming the Regional Director's offer of 12 February 1991 but saw no reason to change the grade, the right one for the post; he was asking the Director of Personnel to make sure the complainant had received the terminal entitlements; but he was granting no sum in damages.

That letter is the decision he challenges.

B. The complainant has three pleas.

First, the WHO failed to keep its promise to employ him as an administrative officer in the Professional category of staff. The post was classified in that category and the project was to last four years. Consultancies are by definition temporary; so the Organization failed to keep its promise. He would not have resigned from his job with the United Nations Volunteers had he known that the WHO appointments would confer consultancy status, particularly since his prospects in the UNDP office in the Comoros were good.

Secondly, his termination was wrongful, arbitrary and unjustified. The decision of 8 December 1988 was taken "unilaterally, in gross breach of the material rules and procedure, and without prior consultation of the other parties to the project, namely the Government of Zaire and the UNDP, who had to agree to recruiting him". So the decision comes under Staff Rule 1230.1.3, which covers "failure to observe or apply correctly the provisions of the Staff Regulations or Staff Rules, or the terms of [his] contract".

The grounds on which the WHO seems to have founded the termination - his unsatisfactory performance - are mistaken. His supervisors consistently found his work satisfactory and he got on well with the other staff.

The Organization was in breach of the general principle in Rules 1040, 1050, 1060 and 1070 that an official must be given notice of non-renewal or non-confirmation of appointment. It asked him to leave less than 24 hours after it had taken the decision of 8 December 1988.

It has not yet granted him the benefit of Rule 630.2, which entitles him to annual leave at the rate of two-and-a-half working days for each full calendar month on "pay status". Nor has it paid him in accordance with Rule 630.8 for each day of accrued annual leave up to a maximum of 60. Lastly, it has not paid him the daily allowance for authorised travel provided for in Rule 830.1.

Thirdly, there was "personal prejudice on the part of a supervisor" within the meaning of Rule 1230.1.1, since he was removed without any proper explanation and replaced by someone unqualified.

He seeks the quashing of the decision of 8 December 1988; appointment to a similar post at grade P.3 and an award of 720,063 United States dollars in settlement of his entitlements, material and moral damages and costs.

C. In its reply the WHO denies promising to appoint the complainant to a post as administrative officer since it did not yet exist. Correspondence from the UNDP misled him, but, as the evidence shows, the WHO always made quite clear the type and length of the appointment it was offering him. From the start it was to be a consultancy for a specific job and project, and the Organization constantly stressed the need for strict observance of the recruitment procedure. The post he left in the Comoros was not in the Professional category and he knew that the WHO would not give him such a post. So his appointment as consultant caused him no financial or professional injury.

There was neither wrongful termination nor breach of the Staff Regulations and Rules and the complainant's contract. His appointment to the post of administrative officer was subject to the usual selection procedures, and his application was unsuccessful. His appointment ended once he had completed the tasks set out in his contract, so he cannot allege withdrawal of offer or wrongful termination. As for the requirement of notice, the provisions in the Staff Rules do not apply to consultants, whose appointments end ipso facto upon expiry. The Organization offered him an eleven-month appointment at grade P.2 on the strength of the Regional Board's report but was under no obligation to do so. That offer and the payment of his terminal entitlements give him satisfaction.

He did not suffer from prejudice. Although the WHO's Representative in Zaire did say that "he has not been able to fit into the team and ... his contribution to this sensitive project has, on balance, been negative", there is no reason to question that opinion. When the procedure for recruiting an administrative officer at grade P.3 started the complainant's application went to the Selection Board. It failed because preference is given to members of staff and - in line with approved WHO policy - to qualified women.

The Organization asserts that none of the complainant's pleas is founded and asks the Tribunal to dismiss the complaint as a whole.

D. The complainant submits in his rejoinder that the internal appeal bodies never challenged the soundness of his "claim". They agreed on compensating him for injury, and the only difference of opinion was over how to do so.

What the WHO says about the nature of his post is wrong: the only reason why he resigned from the Volunteers was that he felt sure of getting from the WHO an appointment in the Professional category. The UNDP's office in the Comoros had set about creating a P.3 post so as to keep him on.

E. In its surrejoinder the Organization develops the pleas in its reply.

CONSIDERATIONS:

1. The background to this dispute, which goes back to 1988, and the material facts are set out in detail under A. The complainant is impugning a decision which the Director-General of the World Health Organization took on 20 October 1992 and of which the gist is given at the end of A.

2. The complainant wants the Tribunal to quash a decision of 8 December 1988 by the WHO's then representative in Zaire; have him appointed to a post at grade P.3; and order the payment of a total of 720,063 United States dollars in settlement of his entitlements and in material and moral damages and costs. He puts forward three pleas: breach of the promise the WHO made to appoint him to a post as an administrative officer in the Professional category; wrongful, arbitrary and unwarranted termination; and blatant discrimination against him on the part of his supervisor.

3. Before taking up those pleas the Tribunal observes that decisions to renew or extend fixed-term appointments are at the discretion of the executive head, on the understanding, however, that he shall exercise it for the good of the organisation and in its interests. The Tribunal may review a decision of that kind and set it aside if it shows a fatal flaw.

The alleged breach of promise

4. The complainant alleges breach of a firm promise to put him on a Professional category post as the administrative officer of a project, and he says that granting him a contract for consultancy made no difference. The Organization denies such breach: it contends that the only post it ever offered him was as a consultant for a specific limited assignment with no prospects of further employment once he had finished the job it took him on for.

5. The evidence before the Tribunal bears out the Organization's contention. The correspondence it had with the complainant shows that the WHO never offered him anything but a consultancy. If in the discussion that preceded his acceptance of the terms of the Organization's offer of appointment there was any question of granting him any other sort of contract the WHO seems not to have known anything about it.

6. The Organization's position is plain enough from the telex of 25 April 1988 which its Representative in Brazzaville sent to the Representative of the UNDP in the Comoros asking him to tell the complainant that he was being taken on as a consultant for two months. On 13 May 1988 the Representative confirmed his "appointment initially for two months as consultant" and said that "recruitment for the post will be subject to administrative selection procedure and no commitment can be made at this stage".

7. So it is plain that the WHO's only commitment to the complainant was to employ him as a consultant for two months and, after that preparatory stage, take up his application for a P.3 post as administrative officer in keeping with the proper procedure for recruitment. The WHO fully discharged its obligations: it concluded with him the contract of 27 July 1988 for consultancy and in December 1988 put his application to the Selection Board it had set up in the meantime. It committed no breach of promise.

The allegations of wrongful and arbitrary non-renewal

8. The complainant argues that for two reasons the decision not to extend his appointment was wrongful and arbitrary. First, he says, the decision of 8 December 1988 was taken "unilaterally, in gross breach of the material rules and procedure, and without prior consultation of the other parties to the project, namely the Government of Zaire and the UNDP, who had to agree to recruiting him". His other objection is that the WHO failed to comply with the general rule that it must give notice to someone whose appointment is not being renewed or confirmed.

9. The objection about failure to consult the other parties to the project cannot be upheld. On the evidence the Tribunal is satisfied that there is no requirement in the rules on consultancy or in the project agreement that all the parties must consent to recruiting project personnel. The provisions of the Staff Rules that the complainant relies on are therefore irrelevant to his case. Even if the proper implementation of the project did require the parties' consent breach of the requirement could not affect the intrinsic validity of a decision to appoint - or not to reappoint - the complainant, the lawfulness of such decision depending solely on the material rules of the WHO as the appointing authority. That is borne out by what the UNDP Representative said in a telex of 15 December 1988, namely that it was "in spite of his own opposition" that the Organization had recruited the complainant under the contract dated 27 July 1988. The Representative's

disapproval in no way impaired the lawfulness of the appointment. By the same token the lack of prior approval from the other parties is utterly immaterial to the lawfulness of the decision not to renew his appointment.

10. The only relevant provision on notice is Manual paragraph II.12.550, which says:

> "The appointment of consultants may be terminated by the Organization at any time upon thirty days' notice, unless otherwise specified in the offer of appointment."

The complainant's contract of 27 July 1988 said nothing of notice. Besides, it is plain that paragraph 550 provides for notice only when the Organization is terminating the appointment "at any time": those are terms that denote termination before the normal expiry of the appointment. Staff Rule 1040, which is about the completion of temporary appointments, requires no notice when the period of service expires in the usual way. Such is the instant case, the impugned decision being refusal to extend the complainant's appointment beyond the date of expiry. The plea about notice accordingly fails.

The plea that the decision is unjustified

11. The complainant submits that the decision not to renew his appointment was unjustified because the reasons given for it - that his work was unsatisfactory and that he was not fit for the international civil service - were mistaken. He says that he did his job properly, came up to his supervisors' expectations and was on good terms with the national and international staff.

12. In a memorandum of 2 November 1988 the WHO's Representative in Zaire stated as follows the reasons for not extending the complainant's appointment:

> "the project ... is entering a decisive phase and must therefore call on highly qualified experts with ample knowledge of the WHO's project-management practices. ... Despite the discussions we have had with Mr. Jérôme Madingar we are of the opinion that he has not been able to fit into the team and that his contribution to this sensitive project has, on balance, been negative."

Those remarks are not necessarily at odds with the complainant's acknowledged qualifications and strengths since what the Organization really wanted was "highly qualified experts with ample knowledge of the WHO's project-management practices".

Under the circumstances the Director-General was merely exercising his discretion and, since his decision shows none of the flaws that might warrant quashing it the Tribunal will not replace the Director-General's appraisal with its own. The plea fails.

The charge of prejudice

13. The complainant alleges, lastly, that the Organization showed blatant prejudice against him. He observes that a candidate he describes as a "mere typist and secretary who did not have the stated qualifications for the job" was chosen instead, "in defiance", he says, "of the most rudimentary rules of due process".

14. The WHO observes that the candidate it put on the permanent post that he wanted was, like him, one of the 51 applicants whose names went to the Selection Board; she was the only woman on the shortlist - there were also two men - and so the Administration's policy of giving women preference for vacancies in the Professional category worked in her favour.

15. There is no evidence nor indeed any suggestion that the selection procedure was flawed. So the WHO had no reason to reject the applicant picked by the Board and its decision to appoint her shows not a trace of prejudice against the complainant. Besides, the Director-General endorsed the Regional Director's offer to him of an eleven-month contract, even though, as he said in the impugned decision, the WHO was under no obligation towards him. What is more, the Director-General accepted the headquarters Board of Appeal's recommendation to grant him terminal entitlements. Again his plea under this head is groundless.

16. Since his claim to the quashing of the impugned decision fails so do his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

Registry's translation,
the French text alone
being authoritative.

SEVENTY-SIXTH SESSION

In re CASSEGNEY — Judgment 1336

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Yvette Cassegney against the International Office of Epizootics (OIE) on 29 March 1993, the OIE's reply of 25 May, the complainant's rejoinder of 5 July and the Office's surrejoinder of 2 August 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Articles 40.6, 40.14 and 80.1 of the OIE Staff Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French citizen who was born in 1952, joined the OIE on 15 February 1990 on a three year fixed-term appointment under Article 40.6 of the Staff Rules. At the material time she held a post as accountant at grade 2, scale 6 in category III in the Administration and Finance Department.

In accordance with the OIE's rules on performance appraisal, on 21 December 1990 the head of Administration and Finance, her supervisor, wrote a report on her work observing that, though taking over some complex accounts part way through the year had not be easy, she had kept the OIE's accounts satisfactorily. There were no further written assessments of her performance.

Towards the end of 1992 and in early 1993 mistakes were found in her work and she was handed back the papers with corrections and observations by colleagues.

In a letter of 3 February 1993 the Director General offered her a one-year extension of appointment from 15 February 1993 to 14 February 1994. She was to return a copy of the letter with her written acceptance by 8 February, but she left work on 10 February without having done so. In the meantime she had had an interview with the Director General on 5 February. She was absent until 22 February, first on sick leave from 11 to 17 February and then on a week's leave granted previously that partly coincided with the sick leave. The letter of 3 February 1993 is the first decision she impugns.

In a letter of 12 February she told the Director General that: (1) she agreed to the idea of renewal of her contract; (2) she was surprised that the offer of renewal was for one year and not three at least; (3) in her three years with the OIE she had never been told of any serious misconduct which might warrant her being offered a shorter appointment. She also claimed compensation equivalent to one year's salary at least for the injury caused by the loss of her job.

On 15 February the Administration sent her a pay slip and a cheque for the sums due to her.

In a letter of 18 February to the Director General, which reached the OIE on the 24th she repeated what she had said in her letter of 12 February and informed him that she would return to work on 22 February. She also asked why the pay slip of 15 February was for amounts due upon termination of contract.

She turned up at the OIE on 22 and 23 February 1993 but was not allowed to work. In a letter dated the 22nd the Director General told her that he had terminated her appointment at 14 February because she had failed to accept by 8 February his offer of 3 February. He confirmed that decision in a letter of 23 February. The letter of 22 February is the second decision she challenges.

In response to that decision she went to the President of the Administrative Commission which audits the OIE's accounts and oversees administration and which was holding its annual meeting in Paris from 22 to 26 February 1993. The President saw the Director General on her behalf and thereafter the Director General offered her a three-month renewal of appointment on the condition that she signed a statement saying that she had refused the original one-year extension. She turned down that new offer.

B. The complainant has three pleas.

First, she submits that the OIE failed to give her reasonable notice of termination. There were only eleven days between the decision of 3 February 1993 and the expiry of her appointment - 14 February - and that was too short a time for her to look for a stable job. Notice was the more important in her case as she had no entitlement to unemployment benefit. Although Article 40.6(b) of the Staff Rules does not require the Administration to give notice of non-renewal of fixed-term appointments all recent contracts granted by the OIE prescribe six months' notice.

Secondly, the decision of 3 February 1993 was unwarranted and arbitrary and showed abuse of authority. The offer of renewal for only one year was contrary to the OIE's usual practice of renewing fixed-term appointments for the same amount of time as the initial appointment. Furthermore, by providing that "a fixed-term appointment shall be an appointment for a continuous period of not less than one year and generally of three years" Article 40.6(a) of the Staff Rules clearly meant three years to be the norm. By failing to observe it the OIE discriminated against her. The absence of any reason for the decision of 3 February 1993 was further evidence of how arbitrary it was. She points out that during her three years of service she received no criticism or sanction.

Thirdly, she submits that the OIE wrongfully terminated the one-year appointment which it offered her on 3 February 1993 and which she accepted, in particular in her letter of 12 February. It did so to prevent her from informing the Administrative Commission of the dispute over the length of the renewal it was offering. The administration wilfully distorted what she said in her letters of 12 and 18 February so as to infer rejection of its offer and terminate her appointment.

The letter of 22 February 1993 shows that the procedure used to terminate the one-year appointment was spurious. The Director General gave as the reason for his decision her failure to reply to his offer of 3 February in time, by 8 February. But that deadline gave her only four clear days, and neither the Staff Rules and Regulations nor her contract prescribe any such time limit. Besides, the letter of 3 February did not make it plain that the time limit was binding.

Because the OIE acted improperly, she found herself suddenly without a job.

She asks the Tribunal to order the OIE to pay her the equivalent of one year's salary (218,140.20 French francs) in damages and award her 35,000 francs in costs.

C. In its reply the OIE challenges the complainant's version of the facts and alleges that her work grew steadily worse. It observes she had only herself to blame for lack of unemployment insurance.

It submits that her pleas are devoid of merit.

First, citing Article 40.6(b) of the Staff Rules, it says it has no duty under those Rules to give notice of non-renewal of fixed-term appointments. Nor does any general principle of law lay such duty on it. Besides, the letter of 3 February 1993 told the complainant, not of non-renewal, but of a one-year extension.

Secondly, the OIE's practice regarding the extension of fixed-term appointments - even supposing there was such practice - conferred no rights on the complainant. Since length of appointment is determined by its own interests, its offer of renewal for one year and not three was warranted: she had made mistakes in the accounts, and though it feared she might do so again, it was willing to give her one last chance.

Thirdly, the OIE submits that the one-year contract which she says it "wrongfully terminated" never existed. She failed to accept in time the Director General's offer of 3 February 1993. Besides, it was plain from her behaviour that she no longer wanted to work for the OIE. When she saw the Director General on 5 February she did not formally and unreservedly accept his offer of renewal. On 10 February she announced that she was leaving for good and on the same day asked for and got a statement of her overtime, returned the keys to the safe which were in her keeping and took away all her personal belongings. Her claim to compensation confirms that she rejected the offer of 3 February 1993. Lastly, in her letter of 18 February, posted on the 23rd, she still spoke of accepting the "idea of renewal"; not until 22 February did she inform the Director General that she accepted the renewal of her appointment for one year.

D. In her rejoinder the complainant enlarges on her three pleas.

She contends that the OIE did have a duty to give her notice because her letter of appointment prescribes three months' notice in the event of termination or non-renewal or of resignation.

The facts show that the decision of 3 February 1993 was not taken in the OIE's interests. Her report for 1990 spoke highly of her but it was the last one she got. Thereafter she was given no hint of what her supervisors thought of her; so could make no comments in answer. Consequently the absence of any assessment of her work in 1991 and 1992 may not be taken as criticism of it. The number of mistakes she made was no higher than the average and anyway some of them were the Administration's. The Director General gave her a salary increment on 1 December 1992, before it was due, and according to Article 40.14 of the Staff Rules "a salary increment may be granted earlier if the services of the staff member are highly appreciated".

Lastly, the one-year appointment did exist: she accepted it. The OIE is mistaken in saying that she rejected it orally or by implication. The reason why she gave back the keys on 10 February was that she knew she would be absent until 22 February and should complete her accounts beforehand so as not to cause her employer any inconvenience. She had not "taken away all her personal belongings" on 10 February 1993. There was no reason to take her absence from 11 to 19 February to mean that she had left for good: she was absent on sick leave and then on leave which she had planned well before those dates. The compensation she claimed in her letter of 12 February was for the loss not of her job but of job security and was to cover the material and moral injury she subsequently sustained. Her claim is not therefore inconsistent with her acceptance of the "one-year renewal" of her appointment.

E. In its surrejoinder the OIE maintains that there was never the one-year contract which the complainant says it wrongfully terminated. Her making the acceptance subject to a claim to compensation equal to the salary that would be due in the event of a one-year extension of her appointment meant that she wanted to leave for good.

The OIE fails to see why renewal of appointment for a specified period should require legal protection in the form of notice.

As for her contention that the decision of 3 February 1993 was arbitrary, the appraisal of her performance is irrelevant to the matter of the offer of 3 February 1993 to extend her appointment. The first report on her work is not very good, and the early award of salary increments is common before the Christmas and New Year holidays.

CONSIDERATIONS:

1. The International Office of Epizootics (OIE) recruited the complainant on 9 January 1990 to serve as an accountant under a fixed-term contract for three years from 15 February 1990 to 14 February 1993.

2. On 3 February 1993 the Director General made her an offer to extend her appointment by one year to 14 February 1994

and gave her until 8 February 1993 to accept. In a letter of 12 February 1993, which reached the Director General's office on the 16th she said she "agreed to the idea of renewal" but was dismayed at being offered only one year.

3. On 15 February she was sent a pay slip and a cheque for "final settlement upon expiry of fixed-term appointment". In a letter of 18 February, posted on the 23rd and received at the Office on the 24th, she confirmed the acceptance in her letter of 12 February of the "idea of renewal" and said she intended to go back to work on the 22nd. But in reply to her letter of 12 February the Director General informed her in a letter of the 22nd that since she had failed to accept by the 8th his offer of the 3rd her appointment had expired on the 14th.

4. As soon as she got his reply she sent the Director General a fax letter also dated 22 February pointing out that as early as the 12th she had agreed to the idea of renewal and so took the view that her appointment had been extended by one year. The following day, the 23rd, the Director General confirmed what he had told her in the letter of 22 February. But on the 26th he said he would, if she wished, offer her a three-month appointment. She refused. She is impugning the decisions of 3 and 22 February 1993 and claims damages.

5. A decision to renew or extend a fixed-term contract without notice or compensation is a discretionary one, though the discretion must be exercised in the Organisation's interest. The Tribunal will review the decision and will set it aside if it was taken without authority or in breach of a formal or procedural rule, or was based on a mistake of fact or of law, or overlooked some essential fact, or drew mistaken conclusions from the factual evidence, or constituted abuse of authority.

6. The complainant has three main pleas: absence of reasonable notice, the arbitrariness of the decision of 3 February 1993, and wrongful termination of the one-year contract.

7. She first objects that the Office told her only eleven days before expiry that her appointment would be extended, not by three years but by one. She was, she says, entitled to reasonable notice so that she could look for another job.

8. The plea fails. Article 40.6(a) of the Staff Rules says that fixed-term appointments end on the date specified in the letter of appointment. According to paragraph (b) they "may be extended or renewed" at the Director General's discretion but confer no right to extension or renewal.

Paragraph (b) stipulates in fine that a fixed-term appointment "shall, unless extended or renewed, expire according to its terms, without notice or indemnity". Article 80.1 goes even further:

> "A ... fixed-term appointment shall expire automatically and without notice or indemnity on the expiration date specified in the letter of appointment provided for in Article 40.3 of these Rules."

9. The decision of 3 February 1993 offered to extend her fixed-term appointment by one year. If, as she maintains, the purpose of notice is to let staff members whose appointments are being terminated seek alternative employment the Administration had no reason to give her notice since she was getting a year's extension and staying on after the expiry of her current contract. The requirement of her consent changed not a whit the Office's intention of keeping her on: whether or not she accepted was entirely up to her. Nor does she offer any proper evidence in support of her contention that recent appointments provide for six months' notice.

10. Her second plea is that the decision to "renew" her appointment for only a year was in breach of an alleged practice of the Office of renewing fixed-term appointments for periods equal in length to that of the original appointment. She says that giving her only one year constituted "exceptional, non-standard" treatment and was arbitrary, not in the interests of the Office and tainted with misuse of authority.

11. As the Office points out, the decision was not to renew but to extend her appointment. Article 40.6(b), cited above, expressly allows that. Renewal is ordinarily granted for the same period as the preceding appointment inasmuch as it reproduces the same terms and they include duration. But extension is usually shorter. So the decision to extend the complainant's contract by one year was in keeping with 40.6(b).

12. The complainant further charges the Office with acting arbitrarily. She alleges that the decision to extend her appointment by a "non-standard" period of one year fails to explain why she was so discriminated against, and in her submission the Director General was mistaken in referring on 22 February 1993 to "the reasons I gave you when we met on 5 February". She contends, as she said in her letter of 12 February, that she always carried out her duties "conscientiously, competently and discreetly"; that her performance appraisal at the end of her first year was "outstanding"; and that even though she had not got an appraisal after her second year she had "never incurred serious criticism warranting a shorter appointment".

13. The Office retorts that when they met on 5 February the Director General gave her confirmation of the reasons for the extension and told her that while on extended appointment she would get written notice of any mistakes she might make. The Office denies that her performance was beyond reproach. Though it was satisfactory up to 21 December 1990 it then went into such decline that her supervisor decided against writing an appraisal of her in 1991 because she was often ill and had suffered a harrowing bereavement. The Office cites shortcomings in her performance which led her supervisor to tell her in January 1993 that her output was too low for the end of the accounting period and her work riddled with mistakes. That is why in the interests of the Office the Director General offered her an extension of just one year.

14. The evidence being in conflict, the Tribunal will take into account all the circumstances of the case so as to determine whether the impugned decision shows any of the fatal flaws, and it is satisfied on the evidence that although the appraisal she got for her first year was good she later incurred the criticisms mentioned above. So the Director General was free, in judging her suitability and in determining the interests of the Office, to take the view that some features of her performance warranted extending her appointment by only one year, the purpose being - says the Office - to give her a chance to improve or else find another job. The decision was not arbitrary.

15. Her last plea is wrongful breach of a one-year appointment she says she got. She submits that she did accept the offer of extension in the impugned decision of 3 February 1993 when on 5 February she gave oral acceptance of the "idea of renewal" and then written acceptance in her letter of the 12th. She infers the existence of a valid one-year appointment.

16. The Tribunal observes first that all she accepted was the "idea of renewal". That phrase and the protest that accompanied it do not allow of the interpretation that she was conveying unqualified acceptance of the Director General's offer.

17. In any event the Office gives a different version of the facts. It says that on 5 February 1993 she failed to accept an offer the Director General himself made her to work "under supervision". On 10 February, it maintains, she actually said she could not accept a one-year extension.

18. The Tribunal observes that in the letter of 3 February the Director General told her "I would appreciate your returning a copy of this offer indicating your acceptance by 8 February". Instead of signing and returning it by that

date she waited until the 12th to send the Director General a letter - which he says he did not get until the 16th - accepting only the "idea of renewal" of her appointment, without saying anything about the length of it or any other matter. The Office was therefore entitled to infer that she had not accepted the offer of extension it had made on the 3rd.

19. She says she is surprised at the Director General's waiting until 22 February to tell her in answer to her letter of the 12th that he had withdrawn the offer. As early as the 15th, the Office observes, the Administration had sent her a pay slip "in final settlement upon expiry of fixed-term appointment". It argues that though her letter of the 18th reconfirmed the one dated the 12th the Director General did not receive it until the 24th and that her having reported for work on the 22nd prompted it to make its position plain to her in its letter, also of the 22nd, in reply to her letter of the 12th (since the letter of the 18th had not yet arrived).

20. The conclusion is that her failure to accept its offer by the deadline it had set had the effect of cancelling its offer and that no contract was concluded. So her plea of wrongful termination of such contract plainly will not square with the facts and must, like the others, fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

(Signed)

José Maria Ruda E. Razafindralambo Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL INTERNATIONAL LABOUR ORGANISATION

TRIBUNAL ADMINISTRATIF *ADMINISTRATIVE TRIBUNAL*

SEVENTY-SIXTH SESSION

In re KUNICKE (No. 3)

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hermann Gerhard Kunicke against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 15 October 1992 and Eurocontrol's reply of 15 December 1992;

Considering that by a letter of 15 November 1993 the complainant informed the Registrar that he wished to withdraw suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

E. Razafindralambo

Michel Gentot

A.B. Gardner

ORGANISATION INTERNATIONALE DU TRAVAIL

TRIBUNAL ADMINISTRATIF

INTERNATIONAL LABOUR ORGANISATION

ADMINISTRATIVE TRIBUNAL

SEVENTY-SIXTH SESSION

In re TEFERRA

THE ADMINISTRATIVE TRIBUNAL,

Considering the compliant filed by Mr. Admassu Teferra against the Food and Agriculture Organization of the United Nations (FAO) on 22 April 1993 and the Organization's reply of 29 June 1993;

Considering that by a letter of 29 October 1993 the complainant's counsel informed the Registrar of the Tribunal that the complainant wished to withdraw suit;

Considering that suit is unreservedly withdrawn;

DECISION:

The withdrawal of suit is hereby recorded.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda

E. Razafindralambo

Michel Gentot

A.B. Gardner

ISSN 0378-7362

If this address is wrong, please return this sheet to the sender or, at least, the part bearing the address.

Pour tout changement d'adresse, prière de renvoyer à l'expéditeur cette feuille ou, du moins, la partie comportant l'adresse.

Sírvase indicar el cambio de dirección del destinatario y enviar esta hoja al remitente, o al menos la parte en que está escrita la dirección.

INTERNATIONAL LABOUR OFFICE
BUREAU INTERNATIONAL DU TRAVAIL
OFICINA INTERNACIONAL DEL TRABAJO
CH-1211 GENÈVE 22

P.P.
1211 GENÈVE 22